84-600

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WEST MICHIGAN BROADCASTING COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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October 31, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

I. Whether an inflexible and absolute comparative preference is a properly tailored means to further minority ownership consistent with the constitutional rights of non-minority applicants?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner West Michigan Broadcasting Company (West Michigan) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINION BELOW

The opinion of the Court of Appeals, reported at 735 F.2d 601 (D.C. Cir. 1984), appears in Appendix B attached hereto. No opinion was rendered by the District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on May 25, 1984. A timely petition for rehearing *en banc* was denied on August 2, 1984, (Appendix C) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved in this case are set forth in Appendix D. These provisions are 47 U.S.C. § 309 (1970), *as amended by* Act of September 13, 1982, Pub. L. No. 97-259, §§ 114, 115, 96 Stat. 1094; and the First and Fifth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This case squarely presents an important and sensitive issue of communications policy and constitutional law: the role that race may play when the Federal Communications Commission ("FCC") chooses between mutually-exclusive applicants for new broadcast stations. The case generated intense interest and controversy at the agency level[1] and was widely viewed as a crucial test of the FCC's authority to grant race-based preferences when it was before the Court of Appeals.[2]

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[1]The FCC's decision reversed its own Review Board, which had itself unanimously reversed the initial decision of the Administrative Law Judge. Two Commissioners dissented from the FCC's decision.

[2]The National Black Media Coalition, National Association of Black Owned Broadcasters, Inc., the Urban League of Greater Muskegon, and the National Bar Association intervened before the Court of Appeals in support of the FCC. An *amicus curiae* brief in support of

The operative facts are straightforward. West Michigan and Waters Broadcasting Corporation ("Waters") are two competing applicants for authority to construct and operate the first radio station in the rural community of Hart, Michigan. West Michigan's three shareholders are all long-term residents of Hart. Waters' sole stockholder, a black, has never resided in Hart. Furthermore, as Waters' stockholder conceded, Hart has "very few, if any" black residents and Waters proposed to broadcast no programming directed to the needs of black persons. Hearing Transcript at 56.

Both West Michigan and Waters were found to possess the basic qualifications to become the licensee of Hart's first and only radio station. The case therefore turned wholly upon the FCC's application of the comparative factors it uses to choose between mutually-exclusive applicants. In making its determination, the FCC awarded "substantial" credit to Waters because of its stockholder's race. *Waters Broadcasting Corporation*, 91 F.C.C.2d 1260, 1264 (1982) (hereafter cited as "*Decision*") (App. A at 6a).[3] The FCC awarded this credit notwithstanding the admitted absence of any blacks in Hart and Waters' decision to propose no programming directed toward the problems and needs of black persons. Indeed, the FCC expressly "reject[ed] any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed

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the FCC was filed by the Office of Communication of the United Church of Christ and the Telecommunications Research and Action Center.

In addition, the case received much greater press coverage than ordinary FCC comparative proceedings. *See Localism Tips FCC Scales in FM Grant*, 102 Broadcasting 62 (1982); Television Digest, January 11, 1982, at 3, col. 1; The Washington Post, January 20, 1982, at A-21, col. 1.

[3]A copy of the *Decision* is attached as Appendix A.

service area." *Id.* (App. A at 7a). Rather, the FCC embraced the theory that minority-controlled stations are "likely to . . . [provide] a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation. . . ." *Id.* at 1265 (App. A at 8a).

Furthermore, finding that there is a "critical under-representation of minorities" and that increased minority ownership is "essential to realize the fundamental goals of programming diversity and diversification of ownership," the FCC held that the ownership and operation of a radio station by a minority, in whatever context presented, must be given "significant weight in comparative broadcast proceedings." *Id.* at 1264, 1266 (App. A at 6a, 10a). This decision was subsequently affirmed by the Court of Appeals. *See West Michigan Broadcasting Company v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). (Appendix B).

Apart from Waters' racial characteristics, the only comparative factor of decisional significance was local residence background. West Michigan received substantial credit in this respect because all of its shareholders were long-term residents of Hart, *Decision* at 1265 (App. A. at 9a), while Waters was awarded only "moderate" credit for residence within the proposed station's service area but outside the community of license. *Id.* at 1263 (App. A at 6a). Thus, absent the racial merit awarded to Waters, West Michigan would clearly have received the authorization to construct Hart's radio station.

This case is, therefore, remarkably pristine in its constitutional setting: Waters would necessarily lose but for the race of its stockholder; Waters' racial preference cannot be traced to any nexus to a local minority group for no such group exists; and the idea that the non-minority audience is

enriched by the diversity of voices minority ownership brings has no applicability in Hart, for there are no other media voices in that community (white-owned, minority-owned, or otherwise) from which to diversify.

REASONS FOR ISSUING THE WRIT

Concise Statement of Argument

In this case, for the first time, the FCC and the Court of Appeals have held that comparative merit for race shall be awarded—automatically and absolutely—to every minority applicant who seeks to build and operate a radio station. Because those decisions so clearly extend the concept of awarding preferences based on the race of the applicant beyond the restrictions on "benign" discrimination established by the Court in *Fullilove v. Klutznik*, 448 U.S. 448 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the Court should assert its jurisdiction, reverse these decisions, and provide guidance for the constitutional use of race as a factor in comparative broadcast proceedings.[4]

Until now, racial preferences in FCC proceedings have been limited to those situations in which minority ownership

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[4]As the Court of Appeals noted, "Congress itself has passed recent legislation . . . that explicitly mandated that the FCC follow a minority ownership promotion program that would clearly rest on the very view of the public interest that the Commission has here followed . . .." 735 F.2d at 612 (App. B at 57a). This legislation would establish a similar automatic comparative merit for minorities in any lottery-type proceedings which the Commission may adopt in the future to select its licensees. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (c)(iii)). Therefore, by its decision here the Court of Appeals in effect affirmed the constitutionality of that new Congressional scheme.

would create a "broadening of community representation" by giving a "local minority group media entrepreneurship", *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), or where minority ownership is "likely to bring about programming that is responsive to the needs of the black citizenry." *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975). Thus, the *Decision* represents a change in FCC policy that is both fundamental and far-reaching.[5] Merit for race will now be accorded automatically, whenever minorities apply to build and operate broadcast stations.

In the FCC's own words, the "fostering of minority ownership" has become "*in and of itself* a fundamental policy goal of this Commission and is to be given full application and significant weight in comparative broadcast proceedings." *Decision* at 1266 (App. at 9a-10a) (emphasis supplied). There is no mechanism for waiver, and non-minorities are not permitted to establish, through the facts of a given case, that a racial preference is inappropriate or entitled to no, or reduced, weight. Race as a "plus factor" is not tied to

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[5]The Court of Appeals referred to *Radio Gaithersburg*, 72 F.C.C.2d 820 (Rev. Bd. 1979) as "prior precedent" for the award of comparative merit for race in a community without regard to the presence of a local, under-served minority group. 735 F.2d at 611 (App. B at 54a). But the award of merit for race in *Radio Gaithersburg* was made without discussion, in a single sentence, and was plainly not of decisional significance. It is simply disingenuous to suggest that the FCC is not charting new and untested waters in this case. Prior cases have consistently recognized the presence of an under-served minority in the community of license in awarding comparative merit for race. *See, e.g., WPIX, Inc.*, 68 F.C.C.2d 381, 396, 412 (1978); *Deep South Radio, Inc.*, 71 F.C.C.2d 138 (Rev. Bd. 1980); *Gainesville Media, Inc.*, 72 F.C.C.2d 807 (Rev. Bd. 1978); *Alexander S. Klein, Jr.*, 69 F.C.C.2d 2134 (Rev. Bd. 1978) *aff'd*, 86 F.C.C.2d 423 (1981).

any discernible nexus to the community to be served, or the programming proposed for that community. Instead, race, *per se*, will henceforth be a factor of "significant weight" in all such comparative proceedings. Using race in this way is unconstitutional because (i) it is impermissibly inflexible, (ii) it is not remedial in nature, and (iii) it is an extreme yet unnecessary means to accomplish the goal of increasing minority ownership of broadcast facilities.

The Commission's Inflexible Use of The Minority Ownership Preference is Unconstitutional

The constitutional flaw in the approach to the award of merit for minority ownership established in this case lies neither in the idea that race may sometimes be the dispositive comparative factor, nor in a failure by the FCC to consider comparative elements other than race. *See* 735 F.2d at 613 (App. B at 59a). Rather, it is that the comparative merit for race is automatically awarded irrespective of the facts of any given case. In short, the merit is a "static absolute," an award of substantial comparative credit to every minority applicant who seeks to build and operate a broadcast facility. *See Decision* at 1270 (App. A at 15a) (Chairman Fowler dissenting). By not examining such elements as the residence of the minority applicant, the racial composition of the proposed community of license, or the existence and programming of other media outlets in the proposed community, the Commission foregoes any attempt to relate the fact of race to any discernable public interest benefit.

By focusing strictly on the applicant's race rather than the likely effect of race on the applicant's program service, the Commission has created a comparative criterion for which minorities, and only minorities, can qualify. Competing applicants are totally foreclosed from consideration on racially-neutral terms and from rebutting the significance of

minority ownership and participation in particular cases. This feature of the FCC's approach contrasts starkly with the benign racial classifications considered by the Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznik*, 448 U.S. 448 (1980). The medical school admissions program in *Bakke*, for example, permitted competition for 84 percent of the class seats on a racially-neutral basis. 438 U.S. at 374-75 (Brennan, J.). For those seats in which race was a factor, moreover, the program considered:

> on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program.

Id. at 377.

Similarly, the minority set-aside program approved in *Fullilove* reserved 99.75 percent of total construction funds for racially-neutral competitive bidding. 448 U.S. at 515 (Powell, J.). As to the funds set aside for minorities, the program explicitly provided for waivers, exemptions, and rebuttal of the assumptions on which it was based. *See* 448 U.S. at 487 (Burger, C.J.). Indeed, the Chief Justice considered such provisions to be of special significance in finding the program to be constitutional:

> That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the . . . program will be limited to accomplishing the remedial objectives contemplated by Congress and that misap-

> plications of the racial and ethnic criteria can be remedied . . .

See id. at 489.

The FCC's approach, on the other hand, incorporates no analogous flexibility. A minority applicant seeking to build and operate a radio station automatically receives "substantial" merit without regard to what the evidence shows with respect to the likely effect of race on programming. Indeed, the FCC has eschewed any consideration of facts which undercut the significance of this merit in particular cases, or the weight minority ownership should be accorded in differing factual settings. Plainly, in a community which is 50% Black and has ten broadcast stations, all of which are white-owned, the award of the eleventh station to a Black would significantly diversify broadcast ownership in that community. However, if a community is 10% Black and has two broadcast stations—both owned by Blacks—a similar award would not, in racial terms, promote diversity at all. And where, as in this case, a community has no stations, and no minority population, the race of its first broadcast station owner neither serves, nor indeed is even relevant to, the goal of diversity. Indeed, the evanescent concepts of "national diversity" relied upon by the FCC and the Court of Appeals[6] are specious: this station will be licensed to Hart, Michigan; no one outside the Hart area will hear the station; and any public interest benefits flowing from the race of its owner must be related to that community.

As in *Bakke* and *Fullilove*, the Commission's race-based process of conferring comparative merit must take factual differences into account. It must examine the race of the applicant, the community where service is proposed, and

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[6]*See Decision* at 1264-65 (App. A at 7a-8a); 735 F.2d at 611 (App. B at 53a-54a).

the racial mix of voices presently extant. Only then does the award of merit based on race contain the degree of flexibility necessary to pass constitutional muster.

The FCC's Preference Gives Minorities a Preferred Standing in the Broadcast Industry And Does Not Merely Compensate Them for the Present Effects of Past Discrimination

The medical school admissions program in *Bakke* and the minority set-aside program in *Fullilove* were both remedial measures designed to compensate minorities for the present detrimental effects of past discrimination. In *Bakke*, Justice Brennan described the "massive official and private resistance" to the Court's school desegregation decisions. 438 U.S. at 371. He also pointed out that many of the minority applicants to the medical school had been educationally-deprived as a result of that resistance and were thereby prevented from coming "to the starting line with an education equal to whites." *Id.* at 372 (footnote omitted). Indeed, Justice Brennan explicitly held that it was reasonable for the medical school to conclude "that the failure of minorities to qualify for admission . . . under regular procedures was due principally to the effects of past discrimination." *Id.* at 365. Thus, Justice Brennan found that the underrepresentation of minorities in the medical profession "would be perpetuated if [the medical school] retained a single admissions standard." *Id.* at 370.

Similarly, in *Fullilove*, Chief Justice Burger described in detail the "abundant evidence from which [Congress] could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-78. Thus, the adoption of the minority set-aside was deemed necessary to break down "long-standing . . . barriers impairing access by minority

enterprises to public contracting opportunities, or sometimes . . . involving more direct discrimination." *Id.* at 463. By enacting the set-aside, Congress did not "give select minority groups a preferred standing in the construction industry, but . . . embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities." *Id.* at 485-86.

The racial preference at issue here goes well beyond those in *Bakke* and *Fullilove* because it does not compensate minorities for disadvantages they presently suffer in comparative licensing cases due to the effects of past discrimination. Minority applicants in general and Waters in particular are not less able than white applicants to compete to become Commission licensees under racially-neutral comparative standards. If this case had involved a station located in the community in which Waters' shareholder resides, Waters would have received substantial enhancement for local residence background and would have prevailed over West Michigan without regard to race. Thus, the FCC's preference for minority ownership does not assist blacks who have been rendered less qualified than whites by past discrimination. On the contrary, it gives minorities a preferred standing in the broadcast industry. Barring some rational relationship to the programming service that a minority applicant can reasonably be expected to provide—a relationship that the Commission has explicitly declined to require—granting minorities such preferred standing amounts to discrimination for its own sake, something the Court has never approved. *See Fullilove*, 448 U.S. at 497 (Powell, J.); *Bakke*, 438 U.S. at 307 (Powell, J.).

Minority Ownership of Broadcast Stations Is Being Fostered by a Variety of Measures Which Are Less Restrictive and Less Unfair Than an Inflexible Preference

Another factor which makes the FCC's inflexible preference an inappropriate means to achieve greater minority

ownership is the availability of a variety of less restrictive alternatives. This factor was not present in either *Bakke* or *Fullilove*. According to Justice Brennan, there were "no practical means [for the medical school to increase its minority enrollment] in the foreseeable future without the use of race-conscious measures." *Bakke*, 438 U.S. at 376. Also, in *Fullilove*,the set-aside provision was "required to assure minority business participation; otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting." 448 U.S. at 462-63 (Burger, C.J.). *See also id.* at 521 (Marshall, J.) ("Congress reasonably determined that race conscious means were necessary to break down the barriers confronting participation by minority enterprises in federally funded public works projects").

The FCC, on the other hand, has a number of alternative devices which can be and are used to foster greater minority ownership without the risk of unfairness which is inherent in its inflexible comparative preference. For example, the Commission liberalized its financial standard specifically to benefit minority applicants for broadcast facilities. *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 F.C.C.2d 407 (1978). The FCC is currently exploring other ways to make it easier for minorities to obtain funds for broadcast ventures. *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 48 Fed. Reg. 5976 (February 9, 1983). Also, in 1978, the FCC announced that it would grant tax certificates to broadcasters who sold stations to minorities. See *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 983 (1978). These certificates enable the seller of a broadcast station to defer the gain realized upon the sale or use it to reduce the basis of certain depreciable property,

or both. Moreover, the Commission has recently broadened the availability of tax certificates to enable them to be employed as creative financing techniques and further stimulate minority ownership. *Id.*

The FCC has also adopted a rule which permits a licensee whose station has been designated for license revocation to sell the station to a minority at a price substantially below fair market value. *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 983 (1978). In addition, the FCC has created opportunities for minorities to apply for new AM stations through a set-aside similar to that approved in *Fullilove* whereby channels would be made available to minority applicants in large cities where the "need is greatest because minority populations are the most numerous." *Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345, 1369 (1980), *aff'd sub nom., Loyola University v. FCC*, 670 F.2d 12 (D.C. Cir. 1981).

None of the alternative measures described above poses the problems that are created by the use of an inflexible preference in comparative cases. Improved access to financing is a true remedial measure which disadvantages no white person. Similarly, tax certificates create an incentive for broadcasters to transfer their stations to minorities and impose no handicap or hardship on non-minorities. The restriction of distress sales and certain frequencies to minority applicants affects whites more directly; however, neither instance involves a situation where black and white applicants are seeking the same facility and are compared in an adjudicatory proceeding. Thus, invidious comparisons are avoided and the harm to whites becomes more widely dispersed and attenuated.

West Michigan is not conceding that all of these alternative measures would withstand constitutional analysis under all factual settings, and no specific application of any of these measures is involved here. The point is simply that there are readily available alternative means which do not pose the stark and ominous constitutional infirmities of the absolute minority preference adopted by the FCC and endorsed by the Court of Appeals here. This fact makes recourse to such an absolute preference all the more inappropriate and constitutionally suspect.

CONCLUSION

The FCC and the Court of Appeals have taken the use of racial preferences beyond constitutionally-permissible bounds. The new policy, enunciated in this case for the first time, will lead to racial preferences which non-minority applicants can neither obtain for themselves nor challenge on the basis of the particular facts of individual cases. Such merit is in no way remedial in nature, and goes far beyond the restrictions on race-based preferences contemplated by the opinions issued in the *Bakke* and *Fullilove* cases.

For the foregoing reasons, the Court should grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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October 31, 1984

APPENDIX

Appendix A

Comparative Criteria
Local Ownership
Minority Ownership, Effect on Application

Review Board Decision, 88 FCC 2d 1204, set aside. Credit for minority ownership in a comparative proceeding found to be of at least equal significance as credit for local ownership. Applicant also awarded moderate enhancement credit for residence and past participation in civic activities within the service area of the proposed station but outside of the community of license.
—*Waters B/Cing Corp.*
BC Docket No. 80-688

FCC 82-483

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

WATERS BROADCASTING CORPORATION
Hart, Michigan

BC Docket No. 80-688
File No. BPH-791226CD

WEST MICHIGAN BROADCASTING COMPANY
Hart, Michigan

BC Docket No. 80-689
File No. BPH-800318AI

For a Construction Permit for a New FM Station

APPEARANCES

Vincent J. Curtis, Jr., *Roderick Porter* and *Patricia A. Mahoney* on behalf of Waters Broadcasting Corporation; *Eric L. Bernthal* and *Daniel F. Van Horn* on behalf of West Michigan Broadcasting Company; *Pluria W. Marshall*, on behalf of National Black Media Coalition, *amicus curiae; Julian Freret* on behalf of Alpine Broadcasting Company; *Peter Gutman* on behalf of HJR Communications, Inc.;[1] and *Norman Goldstein* and *Edythe Wise* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: October 28, 1982; Released: December 1, 1982

COMMISSIONER FOGARTY FOR THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN AND SHARP DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS FOGARTY AND RIVERA ISSUING SEPARATE STATEMENTS.

BACKGROUND

1. This proceeding involves mutually exclusive applications for a new FM station in Hart, Michigan, filed by Waters Broadcasting Corporation (Waters) and West Michigan Broadcasting Company (West Michigan). Waters is wholly owned by Mrs. Nancy Waters, a black woman. Mrs. Waters resides 30 miles from Hart, in Muskegon, Michigan, which is within the service area of the proposed station. Mrs. Waters will move to Hart if her application is granted. West Michigan is owned by three local residents, one of whom, with a 24% interest, is a woman. Both applicants propose 100% integration of ownership and management.

2. In a Decision (88 FCC 2d 1204, released December 29, 1981), the Review Board granted West Michigan's application. The Board found that West Michigan's integration proposal was

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[1]The applications of Alpine Broadcasting Company and HJR Communications, Inc., were dismissed by the ALJ. 88 FCC 2d 1213, 1222 (1981).

substantially enhanced by the local residence of its shareholders and their past participation in civic activities in Hart, Michigan. The Board also gave West Michigan some credit for its 24% female ownership. The Board found that Waters' integration proposal was substantially enhanced by its 100% minority and female ownership. However, it awarded Waters slight enhancement only for Mrs. Waters' local residence and past participation in civic activities, finding that they were unconnected to the proposed community of license. The Board concluded that this was a close case involving a choice between the Commission's meritorious policies favoring local ownership and increasing minority ownership of broadcasting stations. Citing the historic and continuing importance attributed to local ownership, the Board concluded that the public interest, convenience and necessity would be better served by a grant of West Michigan's application.

3. The Commission now has before it for consideration: the Board's Decision, an Application for Review, filed January 28, 1982, by Waters, a Protective Application for Review, filed January 28, 1982, by West Michigan,[2] an Opposition filed February 11, 1982, by West Michigan and an Opposition filed February 12, 1982, by Waters; a Motion for Leave to Intervene, filed January 28, 1982, by the National Black Media Coalition (NBMC), an Opposition filed February 9, 1982, by West Michigan, a Motion to Amend Motion for Leave to Intervene, filed June 9, 1982, by NBMC, and an Opposition filed June 17, 1982, by West Michigan; Comments filed February 12, 1982, by NBMC,[3] a Motion to Strike, filed February 19, 1982, by West

[2]Pursuant to the *Note* to Section 1.115(b)(5) of the Commission's Rules, the parties requested leave to file further briefs and oral argument. Because the issues in this case have been fully discussed in the Applications for Review and we do not believe further briefing and oral argument would be helpful, the requests for briefing and oral argument will be denied.

[3]NBMC has not established a basis for intervention pursuant to Section 1.223 of the Commission's Rules. Nevertheless, because of the significance of the issues raised in this proceeding, we will allow NBMC to participate as an *amicus curiae* and accept its pleading. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018-19 (1981); *The Trustees of the University of Pennsylvania*, FCC 78-188, 42 RR 2d 871 (1978).

Michigan, an Opposition filed March 9, 1982, by NBMC, and a Reply filed March 17, 1982, by West Michigan; a Request for Expedited Action filed February 10, 1982, by Waters, and Comments filed February 12, 1982, by West Michigan.[4]

4. We substantially agree with the findings and conclusions of the Board, and they are affirmed except as they are modified by this Decision. We find, however, that the Board erred in its consideration of the comparative factors by failing to give sufficient credit to Waters for Mrs. Waters' local residence and past participation in civic activities, and by holding that West Michigan's enhancement for its principals' local residence and civic activities was to be preferred over Waters' enhancement for local residence and civic activities and for its minority and female ownership. In our view, the factors favoring a grant of Waters' application compel a finding that Waters is entitled to a determinative comparative advantage. Thus, we will reverse the Review Board and grant Waters' application.

LOCAL RESIDENCE

3. Mrs. Waters resides in Muskegon, which is located 30 miles from Hart and within the service area of the proposed station. The Review Board accorded "only slight enhancement" for Mrs. Waters' residence and civic activities finding that they are remote from and unrelated to Hart.[5] Waters argues that the *1965 Policy Statement*[6] prescribed that the credit for residence within a proposed service area "closely follows" credit for residence in the principal community and that the Board erred in its determination that Waters is entitled to "only slight enhancement" for her residence and civic activities. West Michigan argues that Waters is entitled to no

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[4]Consistent with the priority of other matters and the efficient disposition of the Commission's business, we have given expeditious consideration to the pleadings filed in this proceeding.

[5]88 FCC 2d at 1210.

[6]*Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

credit for Mrs. Waters' residence and civic activities because she is undertaking to serve Hart and Oceana County only.[7]

6. *Discussion.* The *1965 Policy Statement* recognized that participation in station affairs by local residents is desirable because it indicates "a likelihood of continuing knowledge of changing local interests and needs." Past participation in civic affairs similarly indicates a "knowledge of and interest in the welfare of the Community." The Commission concluded that similar benefits, albeit on a lesser scale, would be derived from residence in the service area. In addressing the merit to be awarded for ownership participation in station operations, the Commission found that although "residence in the principal community to be served will be of primary importance, [it will be] closely followed by residence outside the community, but within the proposed service area."[8] Here, the Board properly awarded West Michigan substantial enhancement credit for the local residence and past participation in civic activities of its principals. Under the *1965 Policy Statement*, however, we find that enhancement credit for Mrs. Waters' residence and past participation in civic activities should "closely follow" and the slight credit awarded by the Review Board is inadequate. Given Mrs. Waters' record of community activities[9] and her residence located 30 miles from the community of license, but

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[7]Citing the *Primer on Ascertainment by Broadcast Applicants*, 27 FCC 2d 650, 658 (1971), West Michigan argues that the Board erred in giving Waters even slight credit because it would not serve Muskegon "in the sense of responding to specific community problems." Waters' ascertainment was confined to Hart and the surrounding area of Oceana County. Hart is located in Oceana County. Muskegon is in an adjacent county. West Michigan's argument is without merit. The *Primer* affords applicants wide discretion in determining which area outside the principle community should be ascertained. The failure to ascertain the needs of the community of residence of an applicant does not detract from the presumption of knowledge of the service area which the *1965 Policy Statement* attributes to the applicant. 1 FCC 2d at 395-96.

[8]1 FCC 2d at 396.

[9]Waters Exh. 1.

within the service area of the proposed station, Waters' integration proposal is entitled to a moderate enhancement credit.[10]

MINORITY OWNERSHIP

7. The Review Board found that Waters is entitled to a substantial enhancement credit for minority ownership.[11] The Board, however, in weighing the comparative factors, favored West Michigan because of its local ownership.[12] West Michigan, noting the absence of a significant black population in Hart and Oceana County, argues that the Board awarded too much credit to Waters for minority ownership. Conversely, Waters and NBMC argue that the Board's Decision, by relying on local ownership as the determinative factor, is in conflict with the Commission's policy favoring increased minority ownership of broadcast facilities.

8. *Discussion.* The Review Board's Decision properly observed that minority ownership is entitled to substantial credit in enhancing an applicant's integration proposal. As this Commission, the courts, and the Congress have recognized, there is a critical underrepresentation of minorities in broadcast facilities, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of

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[10]Although some previous Commission cases have indicated that civic activities outside of the principal community are "not meaningful in relationship to service to the proposed community ("*What the Bible Says, Inc.*", 28 FCC 2d 551, 556 (Rev. Bd. 1971); *Community Broadcasting Co., Inc.*, 60 FCC 2d 951, 953 (Rev. Bd. 1976)), civic activities indicate a knowledge of and interest in the welfare of the community, and we thus agree with the Board "that it would be more consistent with the *Policy Statement* to treat civic participation in the same manner as local residence. . . ." 88 FCC 2d at 1210. Where we differ with the Board, is in our conclusion that Waters is entitled to moderate enhancement credit for Mrs. Waters' local residence and participation in civic activities.

[11]88 FCC 2d at 1210-11.

[12]88 FCC 2d at 1212.

ownership which are at the heart of the Communications Act and the First Amendment.[13] Minority ownership is therefore a valid and, indeed, highly meritorious consideration in determining which applicant, from among competing applicants, will provide the best practicable service to the public. We assign "high importance to fostering the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations,"[14] and we have consistently granted substantial credit for integration of minority ownership in comparative proceedings.[15] Accordingly, Waters is entitled to substantial enhancement credit with respect to its integration proposal.

9. Here, we reject any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed service area. Such an argument is wholly inconsistent with our past determinations

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[13]*TV 9, Inc. v. FCC*, 945 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971); *Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 981-82 (1978).

Congress has recently affirmed the importance of minority ownership in mass media telecommunications policy in its passage of the Communications Amendments Act of 1982, P.L. 97-259, (enacted September 13, 1982), which amended, *inter alia*, Section 309(i) of the Communications Act of 1934, as amended, with respect to the Commission's authority to grant licenses or permits for spectrum uses through a system of random selection. In discussing the preferences for diversification and minority ownership to be included in the random selection system, the Conference Report of this legislation states:

> The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well . . . .

[14]*Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 1368 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1981).

[15]*Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); *Radio Gaithersburg*, 72 FCC 2d 820 (Rev. Bd. 1979), *rev. denied*, FCC 80-734, released December 4, 1980.

granting full credit minority ownership without regard to the nature of any minority population,[16] and holding that the public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs.[17] In view of the continuing underrepresentation of minorities in broadcast ownership, and because minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, it would be contrary to Commission policy to restrict credit according to the racial and ethnic composition of the proposed community of license or service area.[18] Moreover, a nexus requirement would unduly restrict future expansion of minority broadcast ownership contrary to established Commission policy.

DIVERSIFICATION

10. James Waters, husband of Mrs. Waters, is a mmber of the Board of Regents of the University of Michigan. The Board of Regents is the licensee of three non-commercial FM radio stations and one non-commercial television station. The Review Board found that Mr. Waters' position as a Regent is not of decisional significance and not a basis for awarding West Michigan a preference for diversification. In its Protective Application for Review, West Michigan argues that it is entitled to a

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[16]*Radio Gaithersburg, supra. Cf. Minority Ownership of Broadcast Facilities, supra,* at 982-83 (FCC tax certificate and distress sale policies).

[17]*Lee Broadcasting Corporation, 90 FCC 2d 230 (1982).* As stated by the court in *TV 9, Inc.* v. *FCC, supra:* "[I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news . . . . Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." 495 F.2d at 938.

[18]*See Clear Channel Broadcasting, supra,* at 221, citing *Minority Ownership of Broadcast Facilities, supra* at 981.

preference for diversification, because as a Regent, Mr. Waters is responsible for the University's broadcast interests, and his media interests are attributable to Mrs. Waters. For reasons set forth in the Initial Decision[19] and in the Review Board's Decision[20] we find that Mr. Waters' non-ownership interest in the University of Michigan stations is too remote to be accorded significance as a comparative factor in this case.

CONCLUSIONS

11. The Review Board correctly recognized that Waters was entitled to substantial enhancement credit for minority ownership and properly awarded substantial enhancement credit to West Michigan for local ownership. We disagree, however, with its conclusion that West Michigan should be ultimately preferred because of the enhancement for its local ownership. The comparative hearing process requires a weighing of all comparative factors in light of the Commission's policies and the application of those policies to the facts and circumstances of the case. The Board expressed the view that there is a "historical preference for local ownership," observing that the *1965 Policy Statement* states that "local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations."[21] The Board also noted that the concept of localism was recently affirmed as an important element of service to the public in *Deregulation of Radio*.[22] However, the Review Board gave insufficient weight to the Commission's minority ownership policy. While the policy favoring local ownership may be first in time, it is not thereby

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[19]88 FCC 2d 1213, 1218-19 (1981).

[20]88 FCC 2d at 1206-07.

[21]1 FCC 2d at 396.

[22]84 FCC 2d 968, 994, 997 (1981).

first in importance. As we have emphasized,[23] the fostering of minority ownership is also in and of itself a fundamental policy goal of this Commission. The Commission's licensing policy favoring diversification of control of broadcast ownership is also served by our minority ownership policy, and we have identified minority ownership as a "touchstone" for the application of a number of other Commission policies.[24] Accordingly, minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings.

12. In this case, we need not qualitatively differentiate between the substantial enhancement credits awarded for local ownership and for minority ownership or choose between these important policies because of the increased credit which is warranted for Mrs. Waters' local residence and activities. We agree with the Board that the only basis for decision is the qualitative enhancement of the applicants' 100% full-time integration proposals. West Michigan is entitled to substantial enhancement for local residence and past participation in civic activities in the proposed community of license, but its substantial enhancement is closely followed by Waters' moderate enhancement for Mrs. Waters' residence and past participation in civic activities in the proposed service area. Waters is also entitled to a substantial enhancement for its 100% minority and female ownership integrated with full-time management, while West Michigan's enhancement for 24% female ownership integrated with full-time management is substantially less. Weighing all of the relevant comparative factors, we find that Waters' substantial enhancement for minority and female ownership, together with the moderate enhancement credit awarded for Mrs. Waters' residence and civic activities, mandate the conclusion that the grant of Waters' application will better serve the public interest, convenience, and necessity.

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[23]Paragraphs 8 and 9 *supra*.

[24]*Minority Ownership of Broadcast Facilities, supra; Clear Channel AM Broadcasting, supra*.

13. ACCORDINGLY, IT IS ORDERED, That the Motion to Intervene, filed January 28, 1982, and the Motion to Amend Motion for Leave to Intervene, filed June 9, 1982, by National Black Media Coalition ARE DENIED, but that National Black Media Coalition IS GRANTED leave to participate in this proceeding as an *amicus curiae*.

14. IT IS FURTHER ORDERED, That the Motion to Strike, filed February 19, 1982, by West Michigan Broadcasting Company, IS DENIED, and that the Comments, filed February 12, 1982, by National Black Coalition, ARE ACCEPTED as an *amicus* brief.

15. IT IS FURTHER ORDERED, That, the Request for Expedited Action, filed February 10, 1982, by Waters Broadcasting Corporation, IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

16. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review, filed January 28, 1982, by Waters Broadcasting Corporation IS GRANTED, and the Protective Application for Review, filed January 28, 1982, by West Michigan Broadcasting Company, IS DENIED.

17. IT IS FURTHER ORDERED, That the Decision of the Review Board, 88 FCC 2d 1204, released December 29, 1981, IS SET ASIDE, that the application of Waters Broadcasting Corporation (File No. BPH-791126CD) for a construction permit to establish a new FM station at Hart, Michigan, IS GRANTED, and that the application of West Michigan Broadcasting Company (File No. BPH-800318AI), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
William J. Tricarico *Secretary*

DISSENTING STATEMENT
OF
CHAIRMAN MARK S. FOWLER
FEDERAL COMMUNICATIONS COMMISSION

Re: Hart, Michigan Comparative FM Proceeding

In another context, one of my colleagues in the majority observed, "Whatever the deficiencies of the comparative pro-

cess, that process binds us with the force of law, and we should strive to apply it within the bounds of our capability"[25] The cogency of that statement is underlined by the majority's opinion in this case, which I believe to be at odds with judicial and Commission precedent, and, as such, to constitute an unexplained and unwise change of policy that may, additionally, be of dubious constitutionality.

For all the debate this decision has provoked, this case is deceptively simple to analyze and resolve. Actually, one need only grasp several salient (and undisputed) facts as a baseline for the analysis:

1. Mrs. Nancy Waters lives in Muskegon, Michigan.
2. Muskegon is in Lake County.
3. The proposed FM station is in Hart, Michigan.
4. Hart is in Oceana County.
5. Mrs. Waters is Black.
6. There are "very few, if any" Blacks in either Hart or Oceana County.
7. The proposed FM station will be the first station to serve Hart and Oceana County.

The difficult aspect of this case, as in most, lies in applying the law to the facts to reach the correct result. It is at this stage that the majority's analysis begins to go rather obviously awry.

LOCAL RESIDENCE

The majority first draws bead on the slight enhancement the Review Board awarded Waters due to Mrs. Waters' residence

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[25]Dissenting statement of Chairman Charles D. Ferris and Commissioners Joseph R. Fogarty and Tyrone Brown, *WPIX, Inc.*, 68 FCC 2d 381, 415 (1978).

and civic participation in Muskegon.[26] In increasing Waters' enhancement to moderate, the majority cites the *Policy Statement on Comparative Broadcast Hearings* for the proposition that "residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area."[27] Because Muskegon lies within the 1 Mv/m contour of the proposed station, the majority reasons that Mrs. Waters' enhancement for local residence and civic participation should be increased to "moderate" so as to "closely follow" West Michigan's "substantial" enhancement credit for its principals' longstanding residence and civic participation in Hart.

The first observation to be made in this regard is that the *Policy Statement* is a framework, and not a straitjacket, for decisionmaking.[28] The cited sentence from the *Policy Statement* has always been interpreted as it was intended by the Commission—as a general policy guideline, not as a directive to govern any and all future cases notwithstanding their varying factual patterns. What citation to the above sentence from the *Policy Statement* fails to show is that the reason the Commission awards enhancement credit for local residence and civic participation at all is that, "Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as well as any other local activities indicating a knowledge of and interest in the welfare of the community."[29] The salient fact here—totally ignored by the majority—is that the record fails to show either that Muskegon

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[26]Neither Waters nor West Michigan have any other relevant media holdings and both propose full-time integration of ownership and management. Thus, their proposals are quantitatively equal on these scores, and the case turns on the degree of qualitative enhancement each is entitled to on the integration criterion.

[27]1 FCC 2d 393, 396 (1965).

[28]*See e.g., TV 9, Inc. v. FCC*, 495 F.2d 929, 942 (D.C. Cir. 1973) (supplemental opinion on rehearing).

[29]1 FCC 2d at 396.

and Hart have anything in common or that Mrs. Waters' civic activities in Muskegon are such that they evince "a knowledge of and interest in" Hart.[30] When one stops to remember that the community of license of the proposed station is Hart and not Muskegon, and that the station in question is the first *and only* station proposed to serve Hart, this error becomes even more obvious. It becomes a major error because Waters' application, as well as subsequent statements during the hearing, show that Waters proposes to program to serve the needs and interests of *only* Hart and the surrounding area of Oceana County, *not* Muskegon and Lake County communities. (Tr. 60-61.)

To give the majority its due, the opinion does note in the margin that "some previous Commission cases have indicated that civic activities outside of the principal community are not meaningful in relationship to the community of service," and cites a couple of the numerous cases standing for that proposition. However, after making that admission, the majority proceeds serenely to observe that "civic activities indicate a knowledge of and interest in the welfare of the community . . ." Quite so. But again, the majority misses the elementary fact that Hart is not Muskegon and that Waters proposed to serve Hart not Muskegon.

Quite simply, this is not a case in which the record shows that Hart has anything whatever in common with Muskegon other than the fact, duly noted by the majority, that each lies 30 miles distant from the other. Under these circumstances, to award Waters enhancement credit for her residence and civic activities in Muskegon only marginally less than that awarded West Michigan's principals, who are long-time residents of Hart and who have been active in civic affairs in Hart for many years, is unjustified. This is not a case in which the competing applicants live in areas that are just as equally oriented toward Hart as toward Muskegon, nor is this a case in which any

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[30]In this regard, the Initial Decision observes simply that Ms. Waters "has been active in civic affairs and political activities in the service area."

particular activity of record in Waters' past evinces any special familiarity with Hart, nor is this a case in which both competing applicants will be relatively unintegrated into station management—all cases wherein a literal interpretation of the cited sentence from the *Policy Statement* would make sense. In this case, in which we are evaluating competing applicants for the first radio station to serve Hart and who both propose full integration of station ownership and management, we are holding that a person with no connection of record with Hart, either residential or civic, is to be awarded only slightly less enhancement credit than three longtime Hart residents who have a combined extensive record of participation in Hart's civic affairs. Given these facts, a literal application of the cited sentence from the *Policy Statement* makes no sense at all.

MINORITY OWNERSHIP

As troublesome as this error is, however, it cannot compare to the majority's approach to the issue of the weight to be given to Waters' enhancement derived from minority ownership. Noting that there is a critical underrepresentation of minorities in broadcast ownership, and that minority ownership is a pertinent consideration in determining which among competing applicants will best serve the public interest, the majority would award substantial—and, in this case, decisional—enhancement credit to Waters on its integration proposal, notwithstanding the absence of any appreciable Black population in Hart or in Oceana County.

This aspect of the majority's decision is by far the most troubling, both precedentially and perhaps constitutionally. The majority goes to considerable lengths to discredit the contention that enhancement credit for the integration of minority owners into management should not be a static absolute but rather should be proportionate to the minority population to be served by the station. Because I believe that such a "nexus" is not only consistent with past precedent but may also be a necessary constitutional safeguard, I would like to elaborate on this issue.

First, it is essential that my precise contention be clearly understood. I am most emphatically *not* saying that in factual circumstances such as these that *no* enhancement credit for integration of minority ownership into management should be given. What I *am* saying is that it is entirely consistent with Court and Commission precedent to *weight* the *degree* of enhancement commensurate with the extent to which minorities are represented in the community of license.

I would next note that there is nothing inherently reprehensible or revolutionary in the proposition that qualitative enhancements generally are susceptible to being increased or diminished depending on the interplay of other facts in the case. The *Policy Statement* specifically provides for such weightings.[31] This is entirely consistent with the purpose for which qualitative enhancements are awarded in the first place: that is, that certain additional factors attaching to the applicant's integration proposal either magnify or detract from the degree to which its integration proposal will, in fact, contribute to the achievement of the *Policy Statement* goal of best practicable service. All qualitative enhancements are traceable to this fundamental concern that the programming provided the local community be the programming that best fills local needs and interests.[32] The enhancement awarded to an applicant's integration proposal by virtue of the participation in management of principals who are members of a minority group is not different in this regard. In point of fact, both Court and Commission precedent specifically reference the fact that such enhancement credit is awarded because of the presence of corresponding minority group members in the local community and thus because the minority ownership/participation in manage-

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[31] 1 FCC 2d at 395.

[32] See *e.g.*, *Gainesville Media, Inc. et al.*, 70 FCC 2d 71, 135 (I.D., 1977), 70 FCC 2d 58 (Rev. Bd. 1978), wherein the enhancement was "tempered by the fact that" [the principal in issue] is not a local resident and has not been active in local Gainesville affairs notwithstanding a brief period of residence in Gainesville . . ."

ment will to a special degree help assure that special minority programming needs and interests are met. Thus, it is entirely consistent not only with the purpose underlying this particular qualitative enhancement, but also with the purpose underlying such enhancements generally, to find that it can be magnified or diminished depending on other pertinent facts in the case, particularly the presence or absence of a minority presence in the local community.

The principal case in this area is, of course, *TV 9, Inc. v. FCC*, which the majority cites, *inter alia*, in rejecting the notion of a weighted enhancement. A careful reading of *TV 9*, however, gives scant support for citing it for this proposition. In *TV 9*, one of the competing applicants, Comint, had two principals who were Black and whose combined interests totaled 14.7% of Comint. Both were apparently to be integrated into the management of the proposed station. The Court recited the pertinent facts in this way:

> The principals of Comint include two local Black residents . . . *Both have lived in the local area, of which about 25% of the population are Black, for more than 20 years, and have not only been active in advancing the interests of the Black members of the community but also have been primarily responsible for significant achievements in bettering the conditions of the Black population.*[5]

Notwithstanding these facts, the Commission failed to award Comint any enhancement on the general grounds that it could not presume a correlation between the integration proposal at issue and the station's likelihood of programming to meet local needs and interests. In reversing the Commission's decision, the Court stated quite plainly that:

> Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a Black minority where

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[5] 495 F.2d at 935, emphasis added.

> the Commission is comparing the qualifications of applicants for broadcasting rights *in the Orlando community . . . This minority stock ownership of an applicant serving the Orlando community is a consideration relevant to a choice among applicants of broader community representation and practicable services to the public.* The credit awarded due to [one principal's] participation, as a part owner, in management is not the same as credit based on *broader community representation* attributed to [both principals'] stock ownership and participation.[N]
>
> [N]What the Commission seems to have enunciated as preferable under the integration of ownership is management control by principals who will be representative of the local community and responsive to its needs . . . *The fact that members of a local minority group which otherwise is not represented in the ownership of mass communications media in the Orlando area . . . are participating principals is relevant to considerations of ownership representation of the local community and it is consistent with the objective of the best practicable broadcast service to the community.*[34]

In a supplemental opinion issued to clarify the Court's apparent confusion of stock ownership and integration, and the terms "preference" and "merit," the Court stated clearly that:

> *The record demonstrates that [both principals have] been outstanding in seeking to better the conditions of the Black minority representing 25 percent of the Orlando community . . .* In carrying their civic interests now into this new association it is only reasonable to hold that the combined participation of these two men will promote genuine and meaningful diversity of programming and thereby serve the public interest.[35]

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[34]*Id.* at 936-937, emphasis added.

[35]*Id* at 942, emphasis added.

Admittedly, the Court did not use the precise *word* "nexus." But there cannot be any serious doubt that in *TV 9* the nexus was not only present but was also a critical factor in the court's rationale.[36] Lest there be any serious doubt on this score, in a subsequent case, *Garrett v. FCC*,[37] the same court was specific:

> The entire thrust of *TV 9* is [that] Black ownership and participation together are themselves likely to bring about programming *that is responsive to the needs of Black citizenry*, and that that "responsible expectation' without "advance demonstration' gives them relevance.[38]

That, in essence, is a perfect distillation of the rationale of *TV 9*. The "nexus" that need *not* be demonstrated is the nexus between integration of minority owners into management on the one hand and the presentation of programming responsive to the concerns of the local minority community on the other. The nexus that does seem to be germane, however, is the nexus between the enhancement and the presence of a local minority population.

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[36]Not surprisingly, the majority fails to account for this rather evident aspect of the Court's opinion. Instead, the majority at n. 17 cites the *TV 9* court's quotation of a footnote in the earlier *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n. 36 (D.C. Cir. 1971) by which the majority purports to show that the *TV 9* opinion was rendered devoid of any concept of nexus. In context, however, the *Citizens Communications Center* footnote elaborated on the statement that challengers to an incumbent licensee must generally be given at least the chance to a comparative hearing under Section 309(e) of the Act. Thus, the footnote itself is not pertinent to the issue in this case. What *is* pertinent, however, and what the majority again neglects to recite, is the *TV 9* court's elaboration on the import of the *Citizens Communications Center* footnote: "It is consistent with the primary objective of a maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, *but in good faith as broadcasting community representation, gives a local minority group media entrepreneurship.*" *Id.* at 937, emphasis added.

[37]*Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[38]*Id.* at 1063.

Nor was this element of nexus lost upon the Commission in the ensuing major case involving the renewal of WPIX(TV), New York. In fact, the Commission's decision rather explicitly recognized the element of nexus in the decision to consider minority ownership and participation as an enhancement to the integration criterion rather than as an element of the diversification criterion. In dissenting to this treatment of minority ownership, one of my colleagues in today's majority would have made minority ownership and involvement "a legally separate issue which . . . should not be subsumed under either the distinct diversification or integration issues." In this dissenting statement, just as in today's majority opinion, an attempt was made to cite *TV 9* in support of this proposition:

> It is at least clear that the court was telling the Commission that minority ownership and participation in station management is in the public interest, *especially where the licensee or station at issue serves a significant minority audience* . . . The record [in *WPIX*] shows that [one applicant's minority-group stockholders] have significant broadcast experience *and substantial involvement in minority rights issues in the community proposed to be served.*[39]

Thus, in *WPIX* apparently even the dissenters were cognizant of the relevance of a nexus between enhancement under the integration criterion for minority ownership and participation and the presence of minorities in the community of license.

Undaunted, the majority here states that the nexus argument is "wholly inconsistent with our past determinations granting full credit for minority ownership without regard to the nature of any minority population," citing *Radio Gaithersburg.*[40] *True enough, no nexus was alluded to in the Radio Gaithersburg*—but in that case the enhancement awarded was not dispositive. On the other hand, however, other cases are careful to show the presence of minorities in the

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[39]*WPIX, Inc.*, supra at n. 1, emphasis added.

[40]*Id.* at 452.

city of license where enhancement credit is awarded. See, *e.g.*, *Gainesville Media, Inc.*, 70 FCC 2d 58 at 99 (Rev.Bd., 1978); *Midwest Broadcasting Company*, 70 FCC 2d 1506, 1508 (I.D., 1978) *modified on other grounds*, 70 FCC 2d 1448 (Rev. Bd. 1979), *rev. denied*, FCC 79-397; *Deep South Radio*, 71 FCC 2d 138, 141 (Rev. Bd. 1979), *rev. denied*, 46 RR 2d 1657 (1980); *compare Acadiana Broadcasting Co., Inc.*, 88 FCC 2d 367, 375 (I.D., 1981), 88 FCC 2d 364 (Rev. Bd. 1981); *Biard Communications, Inc.*, 88 FCC 2d 387, 395-396 (I.D., 1981), 88 FCC 2d 381 (Rev. Bd. 1981).

In this case, in stark contrast to *TV 9*, Ms. Waters testified that there are "few, if any" Blacks in the Hart-Oceana County area Waters proposes to serve; that, in fact, the 1970 census showed that only 0.3 percent of the population of Oceana County were Black. In the course of the required ascertainment survey, Ms. Waters interviewed no Black leaders and proposed no programs to meet interests and concerns of Blacks. Waters' reference during the course of the hearing to substantial Black populations in Muskegon and nearby Lake County communities was stricken from the record as irrelevant. (Tr. 56-61.)

Notwithstanding these facts, the majority advances several reasons purportedly justifying its decision to award Waters substantial qualitative enhancement for integration of its minority owner into management notwithstanding the absence of minorities in the local community. The first of these, apparently regarded by the majority as its strong suit, is the admitted underrepresentation of minorities in terms of broadcast station ownership, and the effect this underrepresentation has on true programming diversity I am emphatically *not* insensitive to the fact that minorities are underrepresented in the ranks of facilities ownership, and I have given my full support to devising ways to swell the ranks of minority owners. Nevertheless, the simple fact of the matter is that, unlike our distress sale policy and unlike rulemakings undertaken with the aim, *inter alia*, of increasing opportunities for minority ownership by increasing the number of available stations, the comparative process is not and never has been meant for the express purpose of increasing minority ownership. The twofold

purpose of the comparative process is to choose the applicant who will render the best possible service to the local community and to further diversification of control.[41] These aims are regarded as being complementary in that diversification of ownership is calculated to assure that the unique needs and interests of the local community will be served rather than being subsumed in presumably larger and possibly conflicting interests of a multiple owner.[42]

The critical distinction that must be kept in mind, however, is that diversification is *not* the same as minority ownership. To say it another way, the primary objective of the *Policy Statement* is diffusion of control—not diffusion of control *to a particular group or groups*. In the case before us, neither West Michigan nor Waters have any other pertinent ownership interests. Thus, consistent with the *Policy Statement* and with the line of cases interpreting it—most notably *WPIX*—both West Michigan and Waters are equal in their ability to further the aim of diversification enunciated in the *Policy Statement*. To go further, as the majority opinion apparently does, and hold effectively that diversification to a minority group or groups is also an intended primary purpose of the comparative process is to do what the Court in *TV 9* expressly said it would not do and what the Commission, following *TV 9*, expressly said in *WPIX* it would not do—and that is, make minority ownership *a separate and distinct* issue in the comparative process, nominally subsumed under the diversification criterion but in reality "a legally separate issue . . . not . . . subsumed under either the distinct diversification or integration issues"[43]

If the majority wishes to *de facto* rewrite *WPIX* and fundamentally revise the stated purpose of the comparative process, it must at least evince an intention to do so and supply reasons

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[41]*Policy Statement*, 1 FCC 2d at 394.

[42]*Id.*

[43]Dissenting Statement of Chairman Ferris and Commissioners Fogarty and Brown, *supra* at n. 1. While the dissenting Commissioners' position is clearly stated, it was not, at least until today, the position of the Commission.

suggesting why it is departing from established policy.[44] Not only has the majority failed to specifically acknowledge the policy change it apparently intends to make; its proffered explanation for its rationale is, to put it charitably, somewhat less than persuasive. *TV 9* and *Citizens Communications Center* are duly trotted out; however, the court in *TV 9* expressly found that minority ownership and participation that reflected minority presence in the local community was entitled to enhancement credit under the integration criterion,[45] and *Citizens Communications Center* held only that the 1970 Commission *Policy Statement on Comparative Renewal* precluded challengers from their right to a full comparative hearing under Section 309(e) of the Act and thus could not stand. The majority also cites the *Minority Ownership Report*[46] which even a casual perusal discloses to have done nothing whatever to alter the comparative evaluation process generally or the *Policy Statement* specifically.[47]

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[44]See, *e.g.*, *Greater Boston v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971): "Reasoned decision [making] promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preferences and irrelevant prejudices . . . An agency's views of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.* at 852.

[45]*TV 9, Inc. v. FCC*, Supplemental Opinion, *supra* at 941, n. 2

[46]*Minority Ownership of Broadcast Facilities*, 68 FCC 2d 170 (1978).

[47]Judging from paragraph 11, the majority evidently perceives a tension between the Commission's fundamental policy goals of localism and minority ownership which must henceforth be remedied by according minority ownership "full application and significant weight in comparative broadcast proceedings." On this point I would simply note that localism and minority ownership would remain perfectly complementary policy goals if we weight the qualitative enhancement awarded for minority ownership commensurate with minority presence in the local community, as the Court in *TV 9* intended we should. Under the majority's approach, however, as this case unmistakably shows, localism, diversification, and minority ownership are transformed from mutually complementary policies into mutually exclusive policies, with minority ownership the apparent winner.

To round out this impressive panoply of authorities, the majority concludes by citing the Conference Report accompanying the adoption of amended Section 309(i) of the Act empowering the Commission to use weighted lotteries in the awarding of broadcast licenses. The majority apparently believes that the Conference Report's discussion of the preferences to be awarded for diversification and minority ownership give credence to today's *de facto* rewrite of the *Policy Statement*. This I frankly find puzzling. In the first place, the conferees were decidedly careful to direct the Commission to consider a number of stated factors in deciding on when to use a lottery notwithstanding its preference for minority ownership.[48] Presumably, had the conferees intended that the minority ownership preference be applied in *all* comparative broadcast licensing situations it would have either (a) *mandated* the use of a weighted lottery in all such situations; or (b) rewritten other Sections of the Act to explicitly require the Commission to award such a preference in the comparative process. The conferees did neither. Thus, while the "plain meaning" of their enactment is for the Commission to award preferences in any broadcast licensing scheme in which the random selection system may be utilized, the majority's inference that this somehow justifies a restructuring of the purpose of the comparative process is not just *not* "plain meaning"—it is absolutely inscrutable.

As its final attempt to inter the concept of weighing the integration enhancement commensurate with minority presence in the local community, the majority states that this approach "would restrict the future expansion of minority broadcast ownership contrary to established Commission policy." This proposition would only appear to be true if, like the majority, one accepts that it is, in fact, "established Commission policy" that the comparative process is specifically intended to increase minority ownership as one of its primary aims. I do not, nor has the Commission, at least before today.

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[48]Conference Report, H. Rep. No. 97-765, at 37-38.

However, lest the casual reader fall for the majority's inference that the "nexus" approach would be the functional equivalent of promulgating a *Plessy v. Ferguson*[49] approach to broadcast station licensing, let me hasten to add that there are an infinity of comparative situations in which a minority owner-manager could win under a "nexus"-based approach. For example, the minority's competitor may have other ownership interests, or not be as fully integrated into management as the minority owner proposes to be, or may not reside as near to or be as closely connected with the community of license as the minority owner is, etc., etc. Because one can already hear the outraged howls of the majority at this point, it may be well to quote again from the supplemental opinion of the Court in *TV 9*:

> With respect to a preference, our opinion does not hold that a competing applicant, without any minority group representation in ownership or management, could not have proved that it could better serve the public interest in promoting diversification of opinion and viewpoint in the respects with which the court is concerned in this case, and by so doing have gained a preference over Comint. In reaching such a conclusion, however, the Commission in our view would have been required to give merit to Comint in the weighing process which led to the preference awarded to the competitor. Under the position taken by the Commission, however, no merit could be accorded Comint in the weighing process.[50]

This, in turn, brings up the most disquieting aspect of the majority's decision today. As the facts in this case plainly show, Waters' minority status is dispositive. In this case West Michigan could not possibly have done more than it did to win. All its owners are long-time residents of Hart. All are or have been involved in community activities in Hart. None have any other media holdings. All will be integrated full-time into the man-

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[49]163 U.S. 537 (1896).

[50]*TV 9*, *supra* at n. 3.

agement of the station. None suffers from any character defect. And yet Waters wins, and wins because its owner is a member of a minority group.

I will not discuss the possible constitutional ramifications of this aspect of the case because my dissent is not premised on the majority's action being unconstitutional but rather on its being so at odds with Commission and judicial precedent that one need not reach the constitutional issue to vacate it. Suffice it to say, however, that without some reasonable showing on the record of the qualifications of Ms. Waters and how she proposes to use her racial background to provide the best practicable service to Hart and surrounding Oceana County, the rational connection between the inherently suspect racial classification employed in this case and legitimate governmental interests is based solely on conjecture, and applicants, as exemplified by today's case, cannot be judged in a racially neutral way.[51] Again, because I am not the final arbiter on this issue, and because I need not be to decide this case, I will let wiser heads than mine decide precisely how this case would be decided under the Supreme Court's standard for judging the constitutionality of racial classifications producing purported "reverse discrimination."[52] Suffice it to say that I find Judge Wilkey's statement in *TV 9* to be pertinent to the facts in this case: "There is no way by which a white, yellow, or red man can achieve the same 'merit' point awarded the Black [person] here. This is, as I understand the word, discrimination."[53]

In sum, despite the degree of debate that this case has occasioned, I believe there is considerably less going on here than meets the eye. The majority's decision should be acknowl-

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[51]See, "Racial Characteristics of License Applicants Considered in Comparative Broadcast Hearings," 9 Suffolk University Law Review 225, 238-239 (1974).

[52]The leading cases are *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

[53]*TV 9, Inc., supra* at 942.

edged for what it is: completely result-oriented. This is without doubt a case in which the majority's "formal obeisance to the rubric of the *Policy Statement* does not obscure the majority's ultimate failure to supply a reasoned analysis which will support its result in terms of applicable law and judicial precedent on the record before it."[34] I do not fault the majority for their good intentions, only for their bad reasoning. But I suppose that sound reasoning is the least important element in any result-oriented analysis.

I dissent.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Applications of Waters Broadcasting Corporation and West Michigan Broadcasting Company for a Construction Permit for a New FM Station in Hart, Michigan.

Chairman Mark Fowler's extended dissent and Commissioner Stephen Sharp's more abbreviated version warrant a brief rejoinder.

I believe the "nexus" arguments of the dissenting statement are adequately answered by the Commission's decision. However, it apparently bears emphasizing here that the telecommunications policy value of enhancing minority ownership in the broadcast media is not restricted to a narrow "minority ownership for minority populations" construction and application. The goal of programming diversity, which our ownership policies seek to foster, is of national as well as local scope and importance. The problems, needs, and interests of our communities are national as well as local, and as our decision holds, the minority ownership enhancement factor in comparative broad-

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[34] *Cf.* dissenting statement of Commissioner *Joseph R. Fogarty in re Cowles Broadcasting*, 86 FCC 2d 993, 1036 (1981).

cast licensing cases is not to be delimited by a "nexus" constriction because "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." As the Commission observed in its *Statement on Policy on Minority Ownership of Broadcasting Facilities*, "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." 68 FCC 2d 979, 981 (1978). This clarification of the application of minority ownership policy in comparative proceedings is rationally premised and in full accord with our statutory public interest mandate. That Chairman Fowler has a different *policy* view on the relative importance of minority ownership in the Commission's hierarchy of comparative criteria does not make our interpretation and decision here any the less sound or firm as a matter of administrative law.

As for the dissents' suggestion that this decision is tantamount to a case of constitutionally impermissible "reverse discrimination," it is sufficient to observe by way of response that the Commission has carefully weighed and balanced the only factors of relevant comparative difference presented in this particular case--local residence and civic activities and minority ownership—and has determined on balance that Waters' substantial—100%—minority and female ownership integrated with management, together with her residence and civic activities in the proposed service area, outweigh the local residence and civic activities and 24% female ownership credits of West Michigan. The Chairman would perform a different balancing calculus and reach a different result, but again that difference is one of policy and does not detract from the legitimacy of the Commission's exercise of discretion in deciding this case.[35] On the other hand, if his dissent is intimating that

[35]As for the Chairman's assertion that our decision is "result-oriented," it seems that my dissenting colleague finds the result here offensive; clearly, I do not.

the Commission may "constitutionally" "consider" minority ownership among other comparative factors but only so long as that consideration does not affect or decide the outcome, then I submit he is wrong both as a matter of policy and as a matter of constitutional law.[56]

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

Re: Hart, Michigan FM Comparative Licensing Proceeding

I feel impelled to explore and respond to the nexus argument urged so energetically by both dissenters,and outlined at considerable length by Chairman Fowler. A nexus requirement is unpersuasive as a legal matter, untenable as a policy matter, and is wholly at odds with the Commission's prior commitment to expanding minority ownership and participation in broadcasting.

As I understand the Chairman's position, the weight given minority owner-managers in comparative licensing cases under *TV 9*[57] and its progeny must correspond to the presence of

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[56] *See University of California Regents v. Bakke*, 438 U.S. 265, 272, 320 (Powell, J.) and 326 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part) (1978) (Holding that "the State has a substantial [diversity] interest that legitimately may be served by a properly devised [medical school] admissions program involving the competitive consideration of race and ethnic origin.").

[57] *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974). *See Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

minorities in the community of license.[*] This new approach would require a sort of sliding-scale formula to determine the weight due an applicant with minority owner-managers—the larger the minority population in the community, the greater the weight awarded.

Only a highly restrictive reading of *TV 9* and *Garrett* furnishes any support for the dissenters' legal view. It was just such inflexible analysis and decisionmaking by the FCC that those cases firmly rejected. In each case, the applicants argued that their minority status was entitled to special consideration in the licensing process, but the Commission brushed them aside and stubbornly clung to established administrative practice. In each case, the court criticized the Commission for its "heavy reliance upon maintenance of the status quo," 495 F.2d at 937, and emphasized that the public interest mandate is broad enough to acknowledge and seek to remedy the "infinitesmal" number of minority-owned and -operated stations nationwide. *Id.* at 936-38; 513 F.2d at 1031-33. The gloss placed on *TV 9* by the Chairman—that the presence of local minorities was "critical" to the result—is simply wrong. The court rather held that the Commission must award merit for minority ownership and participation where it is "likely to increase diversity of content, especially of opinion and viewpoint. . . ." 495 F.2d at 938. *TV 9* and *Garrett* do note the presence of

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[*] I must confess to some uncertainty over the Chairman's precise position. On the one hand, he seems to argue only that the majority's substantial enhancement for Waters' minority and female ownership was in error here because there are few blacks in Hart. On the other hand, he apparently believes that even if there were a more significant number of blacks in the community, race could not be "dispositive" because it is an unalterable trait. (In this regard, he approvingly quotes Judge Wilkey's dissenting statement to denial of rehearing *en banc* in *TV 9* that awarding merit based on race is impermissibly discriminatory because "there is no way by which a white, yellow, or red man can achieve the same 'merit' point awarded the Black . . . here.") Under this latter view, the minority 'merit' would be duly recorded only to be ignored in the ultimate comparative analysis. The implications of the Chairman's nexus-based approach are thus more far reaching than may be evident.

minorities in the cities in question, but do not even remotely suggest that the Commission is limited to awarding "merit" in these circumstances. The decisions imply a permissive, not restrictive, application.

Since *TV 9* and *Garrett* were decided, the Commission has developed a more positive interest in broadening minority participation in the media, consistent with the spirit and tenor of those cases.[59] The narrow construction of these and other authorities advanced by the Chairman would reverse that consistent policy trend, and would, at least in my view, effectively signal a return to the days of pre-*TV 9* policymaking.[60]

There is also little, if any, legal or analytical consistency in supporting waiver of FCC rules, approval of distress sales and tax certificates, and award of licenses by weighted lottery to further minority ownership without reference to the racial and ethnic makeup of the community in question on the one hand, while on the other hand opposing special consideration of minority status in ordinary comparative cases without a nexus

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[59]Since at least 1978, the Commission has held the view that adequate representation of minority viewpoints in broadcasting "serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" and thus enhances the "key objective" of diversity rooted in the Communications Act and the First Amendment. *See Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978).

[60]Part of the Chairman's discussion of the latent constitutional infirmity he finds lurking here is reminiscent of the Commission argument rejected in *TV 9*. The Chairman complains that there has been no "showing on the record of the qualifications of Ms. Waters and how she proposed to use her racial background to provide the best practical service to Hart and surrounding Oceana County . . . ." The FCC unsuccessfully advanced a startlingly similar argument to justify its refusal to award credit for the participation of black owners in *TV 9*—because "there is nothing in the degree or type of participation proposed by [the black stockholders] which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station." 495 F.2d at 936.

showing. All these measures find support in the cases the Chairman would so narrowly construe.[61]

The dissenters' view also makes for unwise and unworkable policy. It is unwise because, as our opinion observes, it would unduly restrict future expansion of minority ownership contrary to established Commission policy. The impact of such a restriction in comparative cases cannot be underestimated because channel assignments in the larger cities where minorities are most densely concentrated are substantially depleted. Remaining channel vacancies are plentiful in places like Hart, Michigan, where under the Chairman's theory, outcome-affecting merit could not be awarded. Thus, the dissenters' position in practical effect would largely eviscerate the thrust of *TV 9* and block the continued progress toward increased minority ownership which the Commission has identified as being of pressing public interest importance.

The sliding-scale approach to minority ownership and participation is also administratively unworkable. If the degree of

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[61]The Chairman's repeated inscrutible charges that our action here is of "dubious constitutionality" may lead the casual reader to believe that he views any outcome-affecting consideration of race to be constitutionally impermissible (especially, as noted earlier, when coupled as it is with citation to Judge Wilkey's dissent.). In any event, such positive consideration is consistent with applicable Supreme Court precedent, specifically the controlling plurality opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). The diversity interest *Bakke* approved in the context of medical school admissions is functionally indistinguishable from the First Amendment interest in an uninhibited marketplace of ideas held paramount in broadcasting. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The latter interest is furthered by diversity of ownership of broadcast facilities. Importantly, for Bakke purposes, race of ethnicity is only one of numerous factors relevant to the decisionmaking process to choose between competing applications. In this case, contrary to the Chairman's contention, race was no bar to West Michigan. It could indeed have done more to show that it was comparatively superior to Waters—by proposing more efficient frequency use, or some form of specialized programming, to name just two possibilities. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 397-98 (1965).

enhancement would be magnified or diminished depending on the percentage of minority residents in the community of license, how would that weight be computed? For example, would an applicant with a ten-percent black owner-manager in a 100-percent black community be entitled to more or less merit than a 100-percent black-owned and -operated applicant for a community with a ten percent black population? Would the answers change if the above-described situations were the same except that the resident minorities were hispanic? These questions of application would proliferate under a nexus approach.

In sum, the law and policy urged by the dissenters would convert our broadcast licensing system from one intended to foster a multiplicity of voices to one which encourages minority broadcast ownership opportunities only in minority communities. Such isolation of voices is reminiscent of the long discredited notion of "separate but equal." We have come too far as a Nation to revert to this view.

DISSENTING STATEMENT OF COMMISSIONER STEPHEN A. SHARP

Re: Hart, Michigan Comparative FM Proceeding

The Commission has before it two competing applications for a construction permit for a new FM radio station in Hart, Michigan. The majority of the Commission reverses the Review Board which, in turn, reversed the Administrative Law Judge. Having read all the opinions in this case, I have concluded that this is, for the most part, an ordinary comparative hearing case.

What distinguishes this case from others is the injection of a politically sensitive policy issue into the decision: "Is the integration preference for minority ownership based upon some nexus to the existence or numbers of minority group members in the community's population?" While it might be politically expedient for a Commissioner who is committed to increasing

minority ownership to follow the majority opinion or not to participate, I must dissent.

I dissent because I am a firm believer that, even where a policy might be correct, there is a right way and a wrong way to effect it. A good end does not justify improper means. Similarly, a consistent and intellectually honest basis for a policy is essential.

Here the Commission has changed its policy. To be sure the majority may believe that they have held this view all along. The fact is, however, that such a view never has been articulated by the Commission. Chairman Fowler's dissent ably catalogues the applicable precedent and analyzes its impact.

When the Commission changes course, it has a legal duty to provide "an opinion or analysis indicating that the standard is being changed and not ignored and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). This duty is especially pertinent where, as here, the Commission acts without public comment on the proposed change in policy. The Commission has abandoned a logical, defensible rationale for discriminating in favor of minority groups—the nexus between minority ownership and service to the minority community—and has, instead, diluted the justification to the point that the Commission appears to have made minority group membership decisive in and of itself. Such discrimination without adequate justification undermines the basis for the preference. The majority's short-term gain may be the Commission's and the public's long-term loss.

Appendix B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2513

WEST MICHIGAN BROADCASING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
WATERS BROADCASTING CORPORATION NATIONAL
ASSOCIATION OF BLACK OWNED BROADCASTERS, *et al.*,
Intervenors

Appeal from an Order of the Federal Communications Commission

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Argued October 25, 1983
Decided May 25, 1984

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Eric L. Bernthal, with whom *Daniel F. Van Horn* was on the brief, for appellant.

David Silberman, Attorney, Federal Communications Commission, with whom *Bruce E. Fein*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee.

David H. Rozzelle, with whom *Vincent J. Curtis* and *Patricia A. Mahoney* were on the brief, for intervenor Waters Broadcasting Company.

James L. Winston, *Walter E. Diercks*, *J. Clay Smith, Jr.*, and *Frederick D. Cooke, Jr.* were on the joint brief for intervenors National Association of Black Owned Broadcasters *et al.*

Allen S. Hammond, IV and *Andrew Jay Schwartzman* were on the brief for *amici curiae* Office of Communication of the United Church of Christ and Telecommunications Research and Action Center, urging affirmance.

Before WRIGHT and GINSBURG, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge:* Waters Broadcasting Corporation and West Michigan Broadcasting Company filed mutually exclusive applications with the Federal Communications Commission for a construction permit to establish a new FM radio station in Hart, Michigan. After conducting a hearing on which of the proposals would, on a comparative basis, best serve the public interest, an administrative law judge granted Waters' application.[1] West Michigan appealed, and the Review Board

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[1]Two other entities, Alpine Broadcasting Company and HJR Communications, Inc., had initially filed applications but had withdrawn from the competition prior to any hearing. *Alpine Broadcasting Co.*, 88 FCC2d 1213, 1214 n. 1 (1981) (decision of ALJ).

reversed the ALJ and granted West Michigan's application.[2] The case was then appealed to the full Commission which reversed the Review Board and granted Waters' application.[3] West Michigan now appeals to this court, arguing issues of both administrative and constitutional law. We affirm the Commission's decision in all respects.

In this case, under the criteria of the Commission's comparative evaluation process, both applicants were judged to be highly qualified. The competition was consistently viewed as a very close one. It was thus a case that forced the decisionmakers to examine with particularity the contours of the various factors that the Commission has traditionally used in evaluating comparative applications. That different results were reached at different stages of decision seems to reflect that at each level the various factors were re-examined and more precisely defined.

West Michigan is a corporation owned by three residents of Hart, Michigan, the community of license. Waters is a corporation owned by one resident of Muskegon, Michigan, located about 30 miles from Hart. Waters' owner made a commitment to move to Hart if her application was granted. Relevant differences between the applications boil down to the following: The Commission awarded West Michigan's proposal to integrate its ownership and management a "substantial enhancement" for its owner's residence and civic activities in the community of license. In contrast, Waters' integration proposal received a "substantial enhancement" because Waters was owned by a black and a "moderate enhancement" because its owner lived within the service area of the proposed station—though not in the community of license itself—and was active in her community's civic affiars. The essence of West Michigan's challenge is that its "substantial enhancement" for local resi-

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[2] *Waters Broadcasting Corp.*, 88 FCC2d 1204 (Rev. Bd. 1981).

[3] *Waters Broadcasting Corp.*, 91 FCC2d 1260 (1982).

dence and civic activities should have been sufficient to merit award of the permit.

As a matter of administrative law West Michigan challenges the way in which these "enhancements" were used by the Commission.[4] First, it challenges the "enhancement" given to Waters' integration proposal for its owner's residence and community involvement in Muskegon. It argues that granting an enhancement for residence and community involvement in an area so distant from the community of licence represents an arbitrary and capricious reversal of prior FCC policy. Second, West Michigan challenges the Commission's use of its "minority enhancement" in this case.

In the face of an extreme underrepresentation of minorities in the ownership and management of broadcast media enterprises the Commission has followed policies of promoting minority ownership and management. Because Waters is wholly owned by a black who will have full management responsibility for the station, the Commission granted a "substantial enhancement" to its application. West Michigan argues that, as a matter of both administrative and constitutional law, the FCC was wrong to grant such an enhancement where the community of license (*i.e.*, Hart, Michigan) contains no significant black population.[5]

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[4]Enhancements were also granted to both applicants on the basis of the owners' gender. Waters, whose only owner is a woman, received a more substantial enhancement for female ownership than did West Michigan. Only one of West Michigan's three owners is a woman, and that owner's interest amounted to only 24%. This was a factor in the Commission's decision in Waters' favor, *see* 91 FCC2d at 1266-1267, but West Michigan does not here challenge this FCC enhancement.

[5]The extreme underrepresentation of minorities in the ownership of mass media broadcast facilities has been exhaustively documented and no party here questions it. At the time of the FCC decision in this case Congress had recently passed legislation pursuant to a finding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982). The

I. THE PROCESS OF COMPARATIVE EVALUATION

Because the issues in this case all derive from the nature of the Commission's comparative evaluation process, we will first discuss the goals and structure of that process. The nature of the process as a whole will become an important factor in our analysis.

A. The General Framework of the 1965 Policy Statement

The general evaluative framework that the Commission uses in its comparative process was first set out in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393 (1965) (hereinafter *Policy Statement*). In the *Policy Statement* the FCC stated that the process of comparison was designed to attain two general policy objectives: "the best practicable service to the public" and "a maximum diffusion of control of the media of mass communications." 1 FCC2d at 394. Although stated separately, the Commission made clear that the two objectives were closely related: "Since independence and individuality of approach are elements of rendering good program

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conference report had noted that a December 1981 survey by the National Association of Broadcasters revealed that of the 8,748 commercial broadcast stations in the nation less than 2% were minority-owned and that of the 1,386 noncommercial stations only slightly more than 2% were minority-owned. *Id.* at 43-44. Previous survey results referred to by the FCC and the courts had revealed even more acute underrepresentation. *See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC2d 979, 981 (1978) ("Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8,500 commercial radio and television stations currently operated in this country." (*quoting* FCC MINORITY OWNERSHIP IN BROADCASTING (1978)) (emphasis in original); *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 n.28 (D.C. Cir. 1973) (In 1971, "'of the approximate 7,500 radio stations throughout the country, only 10 [were] owned by minorities. Of the more than 1,000 television stations, none [was] owned by minorities.'") (*quoting* UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 280 (1971)), *cert. denied*, 419 U.S. 986 (1974).

service, the primary goals of good service and diversification of control are * * * fully compatible." *Id.* It also made clear that this relatedness rested on the view that our society benefits from exposure to a broad diversity of ideas and perspectives, a view of the public interest that it derived in large part from the Supreme Court's First Amendment jurisprudence:

> As the Supreme Court has stated, the first amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."
> * * *

Id. at 394 n.4 (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)); *see TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). *See also FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 794-797 (1978) (discussing relationship between the FCC goal of diversification of ownership and the First Amendment concern for promoting diversity of viewpoint); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971) (same). *See generally* Special Project, *Media and the First Amendment in a Free Society*, 60 GEO. L. J. 871, 1006-1014 (1972).

After discussing its policy goals, the statement focused on how six specific factors related to those goals and how each would be considered in future comparative proceedings. Although most of these factors have been discussed in detail in subsequent cases, they will all be briefly outlined here. Although the contentions of West Michigan focus on the second factor—participation in station affairs by station owners—we will here briefly outline all six of the factors so that the process can be understood as a whole.

1. *Diversification of control of the media of mass communication.* The Commission deemed it to be relevant whether an applicant's owners have ownership interests in other broadcast

stations and other media of mass communication. To increase diversification of control and thus, presumably, "independence and individuality of approach," credit is given to entities controlled by those with few or no interests in other mass media entities. 1 FCC2d at 394-395.

2. *Full-time participation in station operation by owners.* The Commission considered integration of ownership with management to be a factor "of substantial importance." It was viewed as highly relevant to providing the "best practicable service" as well as complementing the diversification goals. The greater the degree of integration of ownership and management, the easier it is to focus on those responsible for station operations. Similarly, integration of ownership with management makes it more likely that diversification of ownership will result in diversification of control.

The Commission's consideration of ownership participation, however, goes beyond the "quantitative" issue of how extensive owner participation in management will be. If an owner actually exercises day-to-day control over the enterprise, it becomes reasonable to evaluate an application in terms of the individual attributes of the owner. Such factors "as * * * [a participating owner's prior broadcast] experience and local residence," are thus considered under this category as "qualitative enhancements" to an application's proposal regarding its integration of ownership with management. *Id.* at 395-396. Most of the questions at issue in this case concern the FCC's use of "qualitative enhancements."

3. *Proposed program service.*. Exceptional programming proposals are considered relevant. But because the Commission recognized the difficulty of making prospective comparative evaluations, "[d]ecisional significance [is] accorded only to material and substantial differences between applicants' proposed program plans." Minor differences are thus not considered relevant. *Id.* at 397-398.

4. *Past broadcast record.* Unusually good or bad prior behavior of a broadcast owner is considered relevant, but a past broadcast record of average quality is not considered relevant. *Id.* at 398.

5. *Efficient use of frequency.* Proposals are given merit if for engineering reasons they would be more efficient than would competing applicants' proposals. *Id.* at 398-399.

6. *Character.* A significant character deficiency would be considered reason for disqualification or demerit. Otherwise character evidence is not considered relevant. *Id.* at 399.

In addition, the Commission stated that enumeration of six specific factors in the *Policy Statement* was "not intended to preclude the full examination of any relevant and substantial factor." *Id.* Where significance could be shown, other factors might be considered.

In this case few of the stated factors established clear distinctions between Waters and West Michigan. Neither applicant alleged any character deficiencies in the other, nor did either propose a more efficient use of the frequency than the other. None of the owners had any prior broadcast record or experience, nor did either entity propose any unique program service. More important, none of the owners of either party had any controlling, or less than controlling, interests in any other broadcast stations or other media of mass communication,[6] and

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[6]West Michigan does contend that Waters' owner should be treated as having an interest in other broadcast facilities through her husband. Mrs. Nancy Waters, owner of Waters Broadcasting Corporation, is married to Mr. James Waters, a publicly elected member of the Board of Regents of the University of Michigan. The Board of Regents, an eight-member body, is the licensee of four noncommercial broadcast stations. At every administrative level West Michigan's argument was rejected. The issue was discussed in the greatest detail by the ALJ:

> There is not evidence * * * that Mr. Waters' relationship with the University of Michigan stations creates a mutual or successive right in Mrs. Waters. * * * He cannot exercise his interest beyond his term of office; his interest is not financial or beneficial; he does not participate in

both entities submitted integration proposals that provided for 100 percent participation in station operation by their owners.[7]

Faced with this substantial equality between the two applicants, the outcome became dependent on the particular attributes of the owners of each applicant. As the Review Board wrote, "[T]he only basis for decision provided on this record is narrow--the qualitative integration enhancements of the participating owners." *Waters Broadcasting Corp.*, 88 FCC2d 1204, 1211 (Rev. Bd. 1981).

The *Policy Statement* concentrates on two "qualitative" factors that could enhance the application of a fully participating owner: broadcast experience and local residence. Although neither side claimed enhancement for broadcast experience, the core of West Michigan's challenge is that the local residence of its owners should have mandated an outcome in its favor.

B. "Qualitative Enhancement" for Integration of Local Ownership With Management

The *Policy Statement* explains the rationale for crediting local residence in terms of the need to provide "a broadcast service which meets the needs of the public in the area to be

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> the stations' operations; and the interest he holds can neither be delegated to nor succeeded to by his wife. Moreover, * * * Mrs. Waters' interest in the application here is independent of Mr. Waters. She has independent financial resources * * * [and] has provided a long list of activities she has undertaken independent of Mr. Waters.

88 FCC2d at 1218. This analysis was adopted by the Review Board, *see* 88 FCC2d at 1206, and by the Commission, *see* 91 FCC2d at 1265. The two applicants were thus treated as equal with respect to diversification of control. We find this entirely reasonable.

[7]The ALJ had given Waters' proposal for quantitative integration of ownership with management slightly more credit than he gave West Michigan's because he doubted West Michigan's owners' ability to operate with three managers. *See* 88 FCC2d at 1219-1220. His decision was overturned by the Review Board, *see* 88 FCC2d at 1207-1208, and this was affirmed by the Commission, which thus treated the two applicants as equal with respect to quantitative integration. *See* 91 FCC2d at 1266.

served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change." 1 FCC2d at 394. Thus, "[p]articipation in station affairs * * * by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs." *Id.* at 396. Moreover, "[p]ast participation in civic affairs [is thus] considered as a part of a participating owner's local residence background, as [are] any other local activities indicating a knowledge of and interest in the welfare of the community." *Id.*

As a result of this policy the Commission credited West Michigan's application with a "substantial enhancement" based on its owners' local residence and their histories of local community involvement. But the Commission also granted Waters' application a "moderate enhancement" because its owner was a resident of Muskegon, a town 30 miles from Hart and in an adjacent county, and because that owner had an extensive history of civic involvement in that community. The FCC based this grant on the *Policy Statement*, which said, "Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area." *Id.* West Michigan argues that this was arbitrary and capricious in light of a consistent FCC practice of awarding no credit for community involvement outside the community of license.

C. Qualitative Enforcement for Integration of Minority Ownership With Management

The *Policy Statement* was intended to provide, and has provided, a general guide for FCC decisionmaking, but it was

not intended to be an inflexible last word.[8] The statement has been subject to elaboration in case-by-case adjudication through which the Commission has incorporated various considerations whose importance to the FCC's "public interest" mandate have only become fully recognized since the *Policy Statement's* issuance.[9] The most prominent of such considerations, particularly significant to this case, is the minority status of an applicant's owner who will fully participate in station management.

Although the Commission did not have minority broadcast ownership promotion policies at the time of the *Policy Statement*, over the past decade the courts, the Commission, and the Congress have all concluded that promotion of minority owned broadcast media facilities, where the minority owner will be fully involved in broadcast management, is an important public policy objective within the FCC's "public interest"

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[8] In the introductory paragraphs of the *Policy Statement* the FCC describes the statement's goals as to provide "a high degree of consistency of decision and of clarity in our basic policies" and to "general[ly] review * * * the criteria governing the disposition of comparative broadcast hearings." 1 FCC2d at 393. But the statement emphasized that "the subject [of comparative evaluation] does not lend itself to precise categorization or to the clear making of precedent," and that "membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. * * * [C]hanges of viewpoint, if reasonable, are recognized as both inescapable and proper." *Id.*

[9] This was wholly consistent with what the FCC said in the *Policy Statement*:

> [B]y this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change.

1 FCC2d at 399; *see also* note 8 *supra*.

mandate *See, e.g., Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *TV 9, Inc. v. FCC, supra*, 495 F.2d 929; *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC2d 979 (1978); *WPIX, Inc.*, 68 FCC2d 381, 410-412 (1978); Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 STAT. 1087, 1094-1095 (*codified at* 47 U.S.C. § 309 (i)(3)(A) and (c)(ii) (requiring that minority ownership program be incorporated into any lottery scheme developed by FCC as means of choosing from among mutually exclusive applicants); H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 40-41, 43-46 (1982) (discussing and endorsing minority ownership program and explaining new statutory requirement that, if comparative hearing scheme is replaced with a lottery, minority ownership program be incorporated into any future lottery scheme). *See also* FCC MINORITY OWNERSHIP TASKFORCE, MINORITY OWNERSHIP IN BROADCASTING (1978); FEDERAL COMMUNICATIONS COMMISSION, MINORITY OWNERSHIP OF BROADCAST FACILITIES: A REPORT (1979); *Mid-Florida Television Corp.*, 37 FCC2d 559, 560 (1972) (concurring statement of Commissioner Hooks). Such minority ownership promotion policies have subsequently been developed in a variety of fields of FCC practice, *see, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities, supra*, and in the comparative broadcast hearing context the policy goal has been incorporated into the *Policy Statement's* framework. *See WPIX, Inc., supra*, 68 FCC2d at 411-412 (minority ownership, if accompanied by owner participation in station affairs, is to be treated as a qualitative enhancement under the integration of ownership with management criterion).

In this case Waters was granted a "substantial enhancement" based on the fact that Waters is an enterprise fully owned by a black who would be fully responsible for its day-to-day management. West Michigan challenges that grant.

II. ANALYSIS OF WEST MICHIGAN'S CONTENTIONS

A. West Michigan's Nonconstitutional Theories

1. West Michigan's challenge to the FCC's award of a "moderate enhancement" for Waters' owner's residence and community involvement in Muskegon.

West Michigan has argued that Waters is entitled to no enhancement for its owner's residence and community activity in Muskegon, Michigan. Muskegon is not the community of license of the proposed station, and thus West Michigan argues, residence and involvement there would not serve the *Policy Statement's* goal of "indicat[ing] a likelihood of continuing knowledge of changing local interest and needs." 1 FCC2d at 396. This position was first rejected by the Review Board, which concluded that Waters' application was entitled to a "slight enhancement" for its owner's Muskegon residence and involvement, *see* 88 FCC2d at 1210, and on appeal it was rejected by the Commission, which awarded Waters' application "moderate enhancement." 91 FCC2d at 1262-1263.

West Michigan supports its interpretation of the *Policy Statement* by citing a number of Review Board opinions that refused to grant enhancement for community involvement outside the community of license. *See, e.g.*, *"What the Bible Says," Inc.*, FCC2d 551, 556 (Rev. Bd. 1971); *Community Broadcasting Co.*, 60 FCC2d 951, 953 (Rev. Bd. 1976). It further argues that its proffered construction conforms to the FCC's longstanding position that "a licensee's 'primary service area' is its community of license, and a 'licensee's prime and most important focus must be on the problems, needs and interests of its community of license.'" Brief for appellant at 44 (*quoting WHYY, Inc.*, 93 FCC2d 1086, 1096 (1983)). But while it is true that the cases cited by West Michigan *do* show that the FCC's current position is contrary to certain prior cases, and it also seems true that the interpretation offered by West Michigan is consistent with cases that emphasize the primary importance

of a licensee's duty to serve the community of license, neither of these points merits overturning the position of the Commission.

The fact that prior cases support West Michigan's analysis clearly cannot be determinative. "[A]n agency's view of what is in the public interest may change, with or without a change in circumstances." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). This court has only required that changes in policies through case-by-case adjudication—if consistent with statutory and constitutional principles—must be accompanied by "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.*

In this case the Review Board and the Commission clearly knew they were deviating from prior cases: indeed they cited those cases and stated that their current position was a change in policy. Although their discussions were not lengthy, they did give reasons for their views. The Commission, for example, recalled the 1965 *Policy Statement's* position on local residence outside of the community of license: Although "residence in the principal community to be served [was to] be of primary importance, [it was to be] closely followed by residence outside the community, but within the proposed service area." 91 FCC2d at 1263 (*quoting Policy Statement*, 1 FCC2d at 396). The Commission then admitted that "some previous Commission cases have indicated that civic activities outside of the principal community are 'not meaningful in relationship to service to the proposed community,'" 91 FCC2d at 1263 n.10 (*quoting "What the Bible Says," Inc., supra*, 28 FCC2d at 556), but it concluded that "civic activities indicate a knowledge of and interest in the welfare of the community, and * * * thus * * * 'it would be more consistent with the Policy Statement to treat civic participation in the same manner as local residence.'" 91 FCC2d at 1263 n.10 (*quoting* 88 FCC2d at 1210 (Review Board decision)). There is nothing unreasoned about this explanation.

Nor is the Commission's position in this case inconsistent with those cases that discuss the primary importance of a licensee's duty of service to the community of license. *See, e.g., HWYY, Inc., supra.* Waters was given only a "moderate enhancement" for its owner's residence and involvement in Muskegon, while West Michigan was given a "substantial enhancement" for its similar status in Hart. This would seem entirely consistent with the policy of primarily focusing on service to the community of license. Cases like *WHYY* offer no support to a contention that residence and community involvement outside of the community of license but within the proposed service area must be held irrelevant to FCC comparative hearings. *See WHYY*, 93 FCC2d at 1096 ("[W]hile the station's primary obligation is to serve the needs of its city of license, [it] also has a *secondary* duty to serve other nearby areas * * *.) (emphasis in original).

For these reasons we have no difficulty rejecting West Michigan's challenge regarding the Commission's treatment of Waters' owner's residence and community involvement.

2. West Michigan's challenge to the FCC's award of a "substantial enhancement" for Waters' ownership by a black who will fully participate in station management.

West Michigan's challenges to the Commission's reliance on its minority ownership promotion policies in this case involve both nonconsitutional and constitutional issues. This section will deal with the nonconstitutional issues.

West Michigan has consistently argued to the FCC that the policy supporting grant of enhancements for minority ownership rests on the poiicy of giving minority populations in a local community access to the broadcast spectrum. An enhancement for Waters would thus be inappropriate because Hart, Michigan has no significant black population. West Michigan agues that, by trying to promote black ownership in a community containing few blacks, the Commission divorced

the enhancement for minority ownership from its original justification, to give voice to local minority populations not yet represented in the local broadcast media. It then argues that such a move is arbitrary and would rob the minority enhancement of any legitimate statutory purpose. The only legitimate reason to promote minority ownership, in West Michigan's view, is to provide programming responsive to a local minority population. Only then, it argues, is promoting minority ownership consistent with the Commission's statutory mandate of serving the interests of the listening public. Without a nexus between the minority population in a local community, it argues, "there is no reason to expect that * * * race will produce any identifiable benefit for * * * program service." Brief for appellant at 17.

The FCC explicitly rejected this argument and has instead asserted that its policy is to promote minority ownership, whenever that ownership is integrated with management, regardless of whether the local community has a black population of any particular size. 91 FCC2d at 1264-1265. The Commission's position is in effect an attack on the premises of West Michigan's argument. The Commission argues that its minority ownership promotion policies have never been exclusively premised on the goal of providing particular minority audiences with minority broadcasters responsive to their needs. To the contrary, the Commission argues that the principal premise of the policies has been that it is generally desirable to provide the listening audience as a whole with programming choices that reflect a diversity of viewpoints and perspectives. Because of the extreme underrepresentation of minorities among the nation's broadcasters, minority perspectives are conspicuously absent from the broadcast media. Promoting minority ownership, if linked to minority management, is desirable as a way of increasing the overall diversity of perspectives represented in the broadcast mass media. The FCC has thus developed a policy of awarding "qualitative enhancements" to minority-owned applicants where those minority

owners will be full participants in station management. On that basis Waters received a substantial enhancement.

West Michigan argues that this FCC position is inconsistent with past FCC policy and with the FCC's statutory authorization, and cites as its principal source of support the opinion of this court in *TV 9, Inc. v. FCC, supra*, 495 F.2d 929. We must reject, however, the argument that that case can support reversing the FCC's policies as put forth in this case. Indeed, the underlying logic of *TV 9* is consistent with the policies the Commission has adopted.

a. The TV 9 opinion.

In *TV 9* this court, reviewed and set aside the results of an FCC comparative broadcast hearing in which the Commission had held that minority ownership of an applicant, by itself, could not be a relevant consideration under the 1965 *Policy Statement*. The FCC had simply stated that the "Communications Act * * * is color blind" and only a showing that an applicant's owner's particular "experience, background, and knowledge of the community" would result in superior service could be considered in a comparative hearing. *See* 495 F.2d at 936 (*quoting Mid-Florida Television Corp.*, 33 FCC2d 1, 17-18 (1972)). This court, in an opinion by Judge Fahy, rejected this analysis.

Judge Fahy's opinion first reminded the Commission that the *Policy Statement*, in setting forth various goals relating to the agency's public interest mandate and in itemizing the various factors it would use to evaluate applicants with respect to those goals, did not inted "to preclude the full examination of any relevant and substantial factor." 495 F.2d at 937 (*quoting Policy Statement, supra*, 1 FCC2d at 399). This was the *Policy Statement's* recognition that "the Act itself, and not the Policy Statement, is the Commission's basic charter." 495 F.2d at 942 (supplemental opinion). The opinion then adverted to the FCC's public interest goal of providing the "diversity of ideas and expression required by the First Amendment," and the

connection between that interest and the longstanding FCC policy of promoting diversity of ownership. *Id.* at 937, *citing Citizens Communications Center v. FCC*, *supra*, 447 F.2d at 1213 n.36[10] This court had previously said that, pursuant to the public interest in diversity of ideas, "[a]s new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." *Citizens Communications Center*, *supra*, 447 F.2d at 1213 n.36, *quoted at* 495 F.2d at 937. Based on these considerations and on the extreme underrepresentation of minorities in media ownership, *TV 9* held that "when minority ownership is likely to increase diversity of content, expecially of opinion and viewpoint, merit should be awarded." 495 F.2d at 938.

In response to the arguments that the race of an applicant's owner was not relevant because a nonminority owner might adequately present a minority's views, *TV 9* recalled "that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." *Id.* Similarly, *TV 9* rejected the argument that a particular minority owner who will participate in management should also have to show "[in] advance [an] assurance of superior community service attributable to such Black ownership and participation[.]" The opinion pointed out that such "an assurance [is] not required, for example, for favorable consideration of local residence, accompanied with participation, on the issue of integration of ownership with management. Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors."*Id.*One of the principal rationales of *TV 9* was therefore that, given the extreme underrepresentation of mi-

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[10]As we discussed above, the goal of promoting diversity of programming has long been considered an essential aspect of the FCC's public interest mandate and was recognized in the FCC's *Policy Statement*.

norities in ownership of the broadcast mass media,[11] the rationale of promoting program diversity—a rationale that is derived from the First Amendment and at the heart of the Communications Act—supports granting positive weight to minority ownership as a factor in comparative broadcast hearings where that ownership is accompanied by participation in station affiars.

West Michigan focuses its attention on a different aspect of *TV 9:* the court's discussion of the sizable black population in the community of license and of that population's presumed interest in programming that might be responsive to its particular concerns. In one sense West Michigan is correct: In *TV 9*, unlike this case, the community of license contained a sizable black population, and the court noted that fact as well as the fact that the community contained no other black-owned broadcast facility. 495 F.2d at 935, 937 nn.26 & 28. But even if we read *TV 9* in the light most favorable to West Michigan's position, its holding would simply rest on two principles: promotion of "broader community representation," *i.e.*, meeting the particular needs of a substantial black community with theretofore unmet needs, and promotion of the best "practicable service to the public by increasing the diversity of content, especially of opinion and viewpoint." 495 F.2d at 941 (supplemental opinion). Nothing in the opinion implies that the court was trying to define precisely or limit the manner in which the FCC could consider minority status and incorporate it into its public interest determination. The opinion certainly has no implication that the FCC was to be limited in any future consideration of race to those cases where both principles would have application. To the contrary, the opinion clearly recognized that the goal of "increasing diversity of content, especially of opinion and viewpoint," *id.*, whether for a locality or for the nation as a whole, was a vital part of the FCC's public interest

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[11] *See* note 5 *supra*.

mandate.[12] It is equally clear that the *TV 9* court believed that that goal made generally legitimate the FCC's granting of positive consideration to proposals for involvement in station management of a broadcast owner who is a member of an ethnic minority that had been excluded from and remains extremely underrepresented within the nation's broadcast media. *See generally id.* at 936-938, 941-942.

b. Prior FCC policy.

In addition to arguing that the Commission's award in this case is beyond its statutory authority and inconsistent with this circuit's prior case law—arguments we have rejected above—West Michigan argues that it is inconsistent with the Commission's own prior policy with respect to minority ownership. We must similarly reject this contention. Although West Michigan cites a large number of cases in which enhancements for minority ownership were awarded to applicants seeking to serve communities of license that contained substantial minority populations, it can cite no cases in which an enhancement was denied because the local population contained few minorities. Indeed, the Commission opinion in this case cites a prior case in which enhancement was awarded without regard to any local minority population's special interests, 91 FCC2d at 1265-1266 & n.16, *citing Radio Gaithersburg*, 72 FCC2d 820 (Rev. Bd. 1979), and thus refutes West Michigan's assertion that its action was in conflict with prior precedent.

But even if there had been no prior case awarding an enhancement without regard to minority makeup of the local population, West Michigan's contention would be wholly without merit. Such a situation would mean little more than that this case presents a new issue on which the Commission has taken a reasonable, well explained position.

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[12]Judge Fahy discussed the issue of minority ownership in both local and national terms. For example, he cites statistics to show the national underrespresentation of minorities at 495 F.2d at 937 n.28.

c. Related FCC policies.

West Michigan's position in this case is, in essence, a contention that the Commission's previously adopted vision of the public's interest in minority ownership promotion can give no support to promotion of minority ownership in communities containing insubstantial minority populations. That position, however, wholly ignores the vision that stands behind a variety of FCC minority ownership programs pursued in areas of broadcast regulation other than comparative evaluation. The conception of the public interest which the FCC pursues through the comparative evaluation process is not necessarily different from that which it pursues through many other aspects of FCC broadcast regulation. The Commission may certainly, as it has done in this case,[13] look to the programs it has adopted in related regulations, note the conception of the public interest embodied in those programs, and act to harmonize its positions.

The minority enhancement used in the FCC's comparative broadcast hearings is part of a broader FCC minority ownership promotion policy. In the decade since *TV 9* the Commission has, for example, developed a program of granting tax certificates to broadcasters selling stations to minorities[14] and another program excepting broadcast station sales to minorities from the general prohibition on broadcast station "distress sales."[15] Both programs operate to give minorities seek-

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[13]*See* 91 FCC2d at 1265 n.16.

[14]Under 26 U.S.C. § 1071 (1982), the FCC can permit sellers of broadcast properties to defer capital gains taxation on a sale whenever it is deemed "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcast stations." For the Commission's decision to grant tax certificates when stations are sold to minority-controlled enterprises, see *Statement of Policy on Minority Ownership of Broadcasting Facilities*, *supra* note 5, 68 FCC2d at 982-983.

[15]"Distress sales" are sales by licensees whose license have been designated for revocation hearing or whose renewal applications have been designated for hearing on basic qualification issues. For the policy with respect to distress sales to minorities, *see id.* at 983.

ing media ownership, *and both operate without regard to the size or existence of a minority population in the community of license.*

It is true that in explaining its adoption of these programs the FCC discussed the need to furnish programming that would be responsive to the unmet listening needs of minority communities. But this was only a part of its explanation. The Commission clearly saw the policy underlying the promotion of minority media ownership as containing a significant element wholly unrelated to the specific needs of any particular minority community.

> [W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.
>
> Thus, * * * it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming.
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> * * * *
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> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of braodcast facilities results in a more diverse selection of programming. * * * What is more, affecting programming by means of increased minority ownership * * * avoids direct government intrusion into programming decisions.

Statement of Policy on Minority Ownership of Broadcast Facilities, *supra*, 68 FCC2d at 980-981 (footnotes omitted).

Given these FCC programs and the reasoning that the FCC has offered to explain them, it is clear that the Commission's position in this case, and the conception of the public interest it embodies, is wholly consistent with the overall policies it has pursued.

d. Congressional approval.

Congress has remained well aware of the Commission's minority ownership promotion programs. Indeed, Congress itself has passed recent legislation, cited in the FCC's decision,[16] that explicitly mandated that the FCC follow a minority ownership promotion program that would clearly rest on the very view of the public interest that the Commission has here followed and that West Michigan argues it was compelled to reject. *See* Communications Amendments Act of 1982, Pub. L. No. 79-259, 96 STAT. 1087, 1094-1095 (*codified at* 47 U.S.C. § 309(i)(3)(A) and (C)(ii)); *see also* H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 40-41, 43-46 (1982). This legislation was designed to facilitate the development of a random lottery system as an alternative to the FCC's currently used but much criticized comparative evaluation process. It explicitly requires that significant preferences for minority applicants, to advantage them over otherwise similar nonminority applicants, be incorporated into any random selection licensing scheme. Its requirement contains no reference to the size or existence of a minority population in the community of license.

By enacting legislation to require the Commission to formulate an additional minority ownership promotion program which, like the policy at issue here, would operate regardless of the racial makeup of the community of license, Congress made

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[16]*See* 91 FCC2d at 1264 n.13.

clear its approval of the Commission's policy.[17] Such "evidence of Congressional approval * * * goes well beyond [the implication of legislative acquiescence from] the failure of Congress to act * * *. Congress affirmatively manifested its acquiescence in the [Commission's] policy * * *." *Bob Jones University v. United States*, ____ U.S. ____, ____, 51 USLW 4600-4601 (May 24, 1983).

B. Constitutional Theory

The last issue in this case is West Michigan's assertion that the FCC's use of an enhancement for minority status in this case violates constitutional equal protection principles. The contention confronts us with a difficult and controversial area of constitutional law—the validity of efforts to remedy past racial discrimination through government-sponsored "affirmative action" plans. In analyzing West Michigan's theory we look to the Supreme Court's two decisions in this area, *Fullilove v. Klutznik*, 448 U.S. 448 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

While it is true that neither *Fullilove* nor *Bakke* produced a majority opinion for the Court—and thus that the law is particularly complicated—this case does not require a detailed or lengthy inquiry into the exact contours of the approaches taken in the numerous separate opinions in those cases. To the contrary, we find that a number of factors show that the FCC's plan

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[17]The enactment was intended to assure that the FCC's minority ownership policies would not be abandoned if the comparative evaluation process of which they were a part was abandoned. The conference report contains an extensive discussion of the public interest rationale behind minority ownership promotion, and that diversity of viewpoint rationale is the same as that voiced by the Commission in this case. *See* H.R. Conf. Rep. No. 97-765, *supra* note 5, at 43-45.

easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches.[18]

In our analysis two factors stand out as particularly important to our conviction that there is no constitutional infirmity in the FCC's behavior. First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media. Congress found that this situation was a part of "the effects of past inequities stemming from racial and ethnic discrimination." H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982). Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure. In giving special weight to these factors we in no way imply that either would be essential to the constitutionality of a government affirmative action program, but their presence places the program's constitutionality beyond question.

In the well known *Bakke* case five Justices reached the constitutional issues presented by Bakke's challenge to a state medical school's affirmative action program. The rationale of

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[18]For cases examining a variety of government affirmative action programs in light of the rationales of the various opinions in *Bakke* and *Fullilove*, *see South Florida Chapter of Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984); *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 594 (1982); *M. C. West, Inc. v. Lewis*, 552 F.Supp. 338 (M.D. Tenn. 1981).

four Justices (Brennan, White, Marshall, and Blackmun)[19] would clearly uphold the FCC's program. Briefly, under the approach of these Justices government can legitimately pursue race-conscious programs to remedy a situation of "substantial and chronic" minority underrepresentation resulting from "past societal discrimination." 438 U.S. at 362. The statistics cited concerning the underrepresentation of racial minorities in the medical profession were no more severe than those concerning the situation in broadcast mass media ownership.[20]

Justice Powell, the only other Justice to reach the constitutional issue, would not have allowed government to so freely justify a race-conscious program as remedial where the remedy is based on "unidentified" societal discrimination. *Id.* at 307-310. But he nevertheless agreed that race can at times validly be a factor in government selection procedures.

The FCC policy would clearly be validated under Justice Powell's approach, which had endorsed a rationale very similar to that offered here by the FCC. Justice Powell approved of educational institutions' use of race as one factor among many in efforts to attain diverse student bodies. Just as the FCC rests its goal of attaining diverse programming on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"[21] Justice Powell recognized that a state university could find support in the First Amendment for the goal of attaining a diverse student body in order to expose students to the "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—[that] is widely believed to be promoted by a diverse student

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[19] *See* 438 U.S. at 324 (opinion concurring in part and dissenting in part).

[20] For statistics concerning minorities in the medical profession, see 438 U.S. at 369-370. For statistics concerning minority broadcast ownership, see note 5 *supra*.

[21] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC2d 393, 394 n.4 (1965) (*quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

body."[22] To this end the race of, for example, a black applicant could be a legitimate consideration in a school's admissions process if otherwise minorities would not be admitted in sufficient numbers "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." 438 U.S. at 323. *See generally id.* at 311-320. Clearly, under Justice Powell's approach the FCC's goal of bringing minority perspectives to the nation's listening audiences would reflect a substantial government interest within the FCC's competence that could legitimize the use of race as a factor in evaluating permit applicants.

Justice Powell did not, however, see a university's creation of inflexible racial quotas that ignore all possible attributes of nonminority applicants as a legitimate means of attaining the best educational environment.

> [R]ace or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.* * *

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[22] 438 U.S. at 312; *see also id.* at 312-313 (*quoting Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

438 U.S. at 317-318 (footnote omitted).

The FCC comparative evaluation process generally conforms to Justice Powell's model. As has been discussed above, it explicitly provides for examination of a wide variety of traits to assess an applicant's potential for increasing diversity and quality of programming. As one commissioner wrote, "In this case, * * * race was no bar to West Michigan. It could * * * have done more to show that it was comparatively superior to Waters—by proposing more efficient use, or some form of specialized programming, to name just two possibilities." 91 FCC2d at 1281 n.37 (separate statement of Commissioner Rivera).[25]

Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' ap-

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[25]For a discussion of the variety of factors that are considered by the Commission, and that might in a given case prove outcome-determinative, *see* Part I-A & B *supra*.

The approach to race endorsed by Justice Powell in *Bakke* closely mirrors Judge Fahy's use of race in *TV 9, Inc. v. FCC*, *supra* note 5. In that case Judge Fahy endorsed use of race as a "plus factor" that, when weighed with other factors, could, but would not necessarily, result in a determination that a particularly minority applicant had qualifications superior to those of a particular nonminority applicant. 495 F.2d at 941 n.2 (supplemental opinion). This accurately describes the current FCC practice derived from *TV 9*.

proval of the Commission's goals and means. In *Fullilove*, where the Court upheld the constitutionality of a congressional enactment requiring that a certain percentage of federal construction funds go to minority-owned enterprises, three Justices (Chief Justice Burger and Justices White and Powell) emphasized the importance of congressional action in the area of race-conscious remedial programs. That there had been action by Congress was found important both because of Congress' "broad remedial powers" derived from its express constitutional authority "to enforce equal protection guarantees," 448 U.S. at 483 (Burger, C.J.), and because of its competence to find as a factual matter the existence of past identifiable discrimination. *Id.* at 506 (Powell, J.).

Of relevance to this case is Congress' passage of Section 115 of the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 STAT. 1087, 1094-1095 (*codified at* 47 U.S.C. § 309(i)(3)(A) and (C)(ii)), which must be viewed as congressional approval of the FCC's minority ownership promotion policies.[24] Passage of the Act must similarly be viewed as giving congressional confirmation to the factual bases of those policies' remedial nature.

In particular, the conference report made clear that in Congress' view the "severe underrepresentation of minorities in the media of mass communications" had resulted from "past inequities stemming from racial and ethnic discrimination." H.R. Conf. Rep. No. 97-765, *supra*, at 43. It also made clear that Congress had explicitly found that the award of significant preferences to minority-controlled broadcast entities was an appropriate way of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications." *Id.* at 44. Under *Fullilove* Congress

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[24] *See* discussion in Part II-A-2-d *supra*.

can clearly adopt such race-conscious policies to assure that current allocations do not perpetuate race-based disparities derived from past discrimination. And an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns. *Cf. M. C. West, Inc. v. Lewis*, 522 F.Supp. 338 (M.D. Tenn. 1981). That is what the FCC has done here.

III. CONCLUSION

For the reasons stated in this opinion, we find that the FCC's use of a minority enhancement in this case was no violation of administrative or statutory law; nor was it a violation of our Constitution's equal protection principles. We therefore affirm the Commission in all respects.

Affirmed.

CERTIFICATE OF SERVICE

I, Daniel F. Van Horn, do hereby certify that I have caused two copies of the foregoing "Suggestion for Rehearsing *En Banc*" to be sent by first class United States mail, postage prepaid, this 9th day of July, 1984 to the following:

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Daniel F. Van Horn

Appendix C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 82–2513

WEST MICHIGAN BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

WATERS BROADCASTING CORPORATION NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, *et al.*,

Intervenors.

FILED
United States Court of Appeals
For the District of Columbia Circuit
August 2, 1984
GEORGE A. FISHER
Clerk

BEFORE: Robinson, Chief Judge: Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and McGowan, Senior Circuit Judge

ORDER

The Suggestion for Rehearing *en banc* of Appellant has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curium
For the Court:

GEORGE A. FISHER,
Clerk

Chief Judge Robinson did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM 1983

No. 82-2513

WEST MICHIGAN BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WATERS BROADCASTING CORPORATION NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, *et al.*,
Intervenors.

FILED
United States Court of Appeals
For the District of Columbia Circuit
August 2, 1984
GEORGE A. FISHER
Clerk

BEFORE: Wright and Ginsburg, Circuit Judges, and McGowan, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of Appellant filed July 9, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

Appendix D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) 47 U.S.C. § 309 (1970), as amended by Act of September 13, 1982, Pub. L. No. 97-259, §§ 114, 115, 96 Stat. 1094.

§ 309(i)-Certain initial licenses and permits; random selection procedure; significant preferences; rules

(1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law—

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.

(4)(A) The Commission, not later than 180 days after September 13, 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion determines that such use is appropriate for the

granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(2) First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(3) Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.